92-1317

Supreme Court, U.S.
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No.

in the Supreme Court of the United States

October Term, 1992

JOHN J. BOYLE,

Petitioner,

vs.

LOUISE SCHMITT, As Ancillary Personal Representative of the Estate of BLANCHE E. BOYLE, deceased, and LOUISE SCHMITT individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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QUESTION PRESENTED

Whether a state court appellate decision violates the Due Process Clause of the 14th Amendment to the United States Constitution where that decision is embodied in a written opinion that expressly decides the case upon propositions of fact excluded at the trial and concerning which the aggrieved party had no occasion or proper opportunity to introduce evidence.

LIST OF PARTIES

The names of all parties in the Florida appellate court whose decision is sought to be reviewed appear in the caption of this case and are named as they appeared below.

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vs.

LOUISE SCHMITT, As Ancillary Personal Representative of the Estate of BLANCHE E. BOYLE, deceased, and LOUISE SCHMITT individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITION FOR WRIT OF CERTIORARI

The petitioner, John J. Boyle, respectfully asks that a writ of certiorari issue to review the decision of the District Court of Appeal of Florida, Third District, entered in this cause on July 14, 1992.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at 602 So.2d 665 (Fla. 3rd DCA 1992), and is reprinted in the appendix hereto, page 1a, *infra*.

The unreported memorandum decision of the Florida Supreme Court declining to accept jurisdiction of this cause is reprinted in the appendix hereto, page 7a, *infra*.

STATEMENT OF JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, was entered on July 14, 1992, affirming the trial court judgment against petitioner of February 19, 1992. The Supreme Court of Florida declined jurisdiction of a timely petition for discretionary review on November 12, 1992. The jurisdiction of this court is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is as follows:

"[N]or shall any State deprive any person of life, liberty, or property without due process of law." Due Process Clause, 14th Amendment, Section 1, United States Constitution.

STATEMENT OF THE CASE

Petitioner's parents James J. Boyle and respondent Blanche E. Boyle entered into a mutual will contract in 1979 agreeing to leave the bulk of their testamentary estates to petitioner. The mother died in 1989, leaving her entire estate by will to respondent Louise Schmitt, petitioner's sister.

Petitioner filed suit against respondent estate to enforce the will contract and against respondent sister as recipient of an inter vivos transfer of $500,000. made by the mother just before she died and allegedly made in fraud of the mother's will contract obligation to petitioner. Record, 56.

Respondents answered raising two groups of defenses: legal defenses challenging whether the contract was formed and subsequently rescinded, and equitable defenses alleging fraud, unconscionability of contract terms, and unclean hands by petitioner. Record, 68. The essence of the equitable defenses was that the petitioner had fraudulently induced his mother to execute the contract by abusing her confidence and had subsequently abused his mother by depriving her of normal love and affection, destroying her marriage with the father, and by representing the father in his divorce action against the mother, all of which were allegedly designed to cause the mother psychological harm.

At the pretrial conference petitioner represented to the court that he could present his case in chief in 90 minutes. Respondents stated they would need five days of trial time to present all of their defenses, particularly the equitable defenses. The trial court bifurcated the trial in its pretrial order. Record 116. A three-hour trial was set to hear the petitioner's case in chief and was limited to the presentation of those legal defenses for which the respondents would require the least amount of time: the defenses challenging the execution of the contract, arguing the "unilateral rescission" of the contract, and arguing the mutual rescission of the contract. The second half of the trial, if needed, would be scheduled for a later date and would give the respondents a full opportunity to develop their equitable defenses.

At trial, the judge limited the petitioner to a presentation of his claim against respondent estate and took no evidence on petitioner's claim against respondent sister

individually, reserving that presentation for a later time, if needed. Transcript of Proceedings, 66, 67. At the conclusion of the three-hour session, the trial judge ruled in favor of respondents without reciting findings of fact or conclusions of law, and stating merely that he had found the respondents' arguments more persuasive than the petitioner's. Transcript of Proceedings, 118.

Petitioner timely appealed the trial court decision to the District Court of Appeal of Florida, Third District, and argued that the trial court had misapplied Florida law to the established facts. In their answer brief, respondents defended their position at trial but added the following argument injecting the equitable defenses which had been precluded at trial:

> In the case at bar, at the time the alleged contract was made the son was, to all appearances, a loving and dutiful son who was helping his parents manage their apartments. It was natural for both of his parents to regard him as a natural object of their bounty.
>
> Nine years later, however, the situation had changed. The son had turned against his mother and sided with his father in what ultimately amounted to nine civil actions in which the father sought to divorce the mother and to grab all of the wealth of the parties, leaving the mother with a small pittance to live out the remaining years of her life.
>
> Such unnatural behavior should not be rewarded and the mother should be allowed to rescind any bequests to her traitorous son. Brief Of Appellee, 7, 8.

The answer brief further compared the petitioner to a television evangelist named in a mutual will contract as third party beneficiary and whose immorality should not merit the benefit of the will contract; and to a faithless secretary or nurse named as third party beneficiary, but who encourages the divorce of the contracting spouses in order to marry the husband and who should not merit the benefit of the will contract. Brief of Appellee, 8.

In his reply brief petitioner pointed out to the state appellate court that the above quote and arguments were an attempt by respondents to argue those equitable defenses that had been precluded at trial. Appellant's Reply Brief, 13.

The state appellate court affirmed the trial court, holding that the mutual will contract was unilaterally revocable by the mother, and that the parents had mutually rescinded the contract in any event. The appellate court then stated as follows:

> Any other result would be harsh and inequitable, particularly in light of John Boyle's conduct against his mother following her move to California. *Boyle v. Schmitt*, 602 So.2d 665, 668 (Fla. 3rd DCA 1992). Appendix, page 6a.

No matter had been raised at the trial — neither evidence nor argument — concerning petitioner's conduct toward his mother. Up to this point in the litigation, no federal question had arisen. But the state appellate court's above statement said in effect that the court could arrive at no other decision when it considered the equitable defenses, the very matters that had been precluded at trial. A federal question of procedural due process under the 14th Amendment now arose unexpectedly and for the first time.

Florida appellate practice barred petitioner from moving for rehearing of the appellate court's decision. He sought discretionary review in the Florida Supreme Court, but that court's jurisdiction was limited in this case to a review of whether the opinion of the district court of appeal expressly and directly conflicted with decisions of the Florida Supreme Court or other Florida district courts of appeal on the same point of law: and that point of law was whether a will contract is unilaterally revocable in Florida. There was no jurisdiction to entertain a due process argument that had arisen in this manner and which did not result from an express construction of the federal constitution. When the Florida Supreme Court declined jurisdiction, petitioner was barred by Florida appellate practice from moving for rehearing of that decision as well.

Hence the federal question arose late in the proceedings because of surprise action by the state appellate court. Florida appellate procedure afforded petitioner no opportunity to specially set up this federal question thereafter.

ARGUMENT

A. THE FEDERAL QUESTION WAS PRESERVED

The right to present evidence is essential to the fair hearing required by the Due Process Clause. *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). In *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917), plaintiff sought to enjoin collection of a drainage tax. His proffered evidence that his land was an island and could not benefit from the tax was excluded. The defendant prevailed. On appeal the state appellate court reversed upon a holding that the land could not benefit from the tax. The Supreme Court reversed, holding that it was a violation of due process of law for the state appellate court to rule upon a proposition of fact that was excluded at trial

and concerning which the aggrieved party therefore had no occasion or opportunity to introduce rebuttal evidence.

In the instant case the trial judge precluded evidence on the respondents' allegations of petitioner's equitable misconduct in an effort to conserve trial time. The Florida 3rd District Court of Appeal affirmed the trial court's judgment against petitioner upon a holding that it could reach no other conclusion in light of petitioner's equitable misconduct. The appellate court expressly ruled against petitioner on the basis of respondents' allegations of equitable misconduct in the absence of any evidence at trial to substantiate those allegations. Petitioner had no occasion or opportunity to present evidence to rebut those allegations at the trial.

This denial of due process of law — the federal question — arose unexpectedly and for the first time in the appellate court's opinion. Petitioner "was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance." *Saunders v. Shaw*, *supra*, 320. The Supreme Court has held that a federal question has been adequately presented even though not raised in lower state courts when the highest state court renders a decision the grounds of which supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930); *Saunders v. Shaw*, *supra*.

Here the highest state court was the 3rd District Court of Appeal, since review in the Florida Supreme Court was discretionary only and was declined. See *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954). The jurisdiction of the Florida

Supreme Court is set out in Article V, §3(b), Florida Constitution. Subsection (3) thereof allows discretionary review of a lower court decision that expressly construes a provision of the federal constitution. No express construction of the Due Process Clause was present in this case. It also allows discretionary review of an express and direct conflict with other Florida appellate decisions on the same question of law: which petitioner sought unsuccessfully on the question of whether will contracts are unilaterally revocable. The Florida Supreme Court had no jurisdiction to review the question of whether the state appellate court had denied petitioner due process by an unexpected consideration of evidence precluded at trial, nor was review permitted on any other basis under the Florida Constitution.

Once the grounds of the state appellate decision supplied a basis for asserting the federal right, petitioner was obliged to specially set up the federal question at the first opportunity. Such opportunity may present itself on a motion for rehearing of the state appellate court decision, as in *Brinkerhoff-Faris*, *supra*. It is not the motion for rehearing that is critical, but that petitioner seize the first opportunity to set up the federal question after it arises. Petitioner had already argued to the state appellate court in his reply brief that the trial court could not possibly have relied on the excluded equitable defenses. When it became apparent that the appellate court itself did rely on the excluded equitable defenses, was there an opportunity for petitioner to argue a violation of the Due Process Clause in a motion for rehearing?

Rule 9.330(a), Florida Rules of Appellate Procedure, states that a motion for rehearing, ". . . shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not reargue the merits of the court's order." Counsel who used a motion for rehearing to reargue points argued in his brief

was scolded in *Parker v. Baker*, 499 So.2d 843 (Fla. 2nd DCA 1986), for violating that rule. Where counsel's motion for rehearing reargued matters that had been argued before and did so in an abrasive manner, he was turned over to the state bar association for disciplinary proceedings in *Patton v. State Department of HRS*, 597 So.2d 302 (Fla. 2nd DCA 1991).

In *Brinkerhoff-Faris, supra*, the aggrieved party moved for rehearing of the state appellate decision and injected the federal question by reasserting its claims on the merits — a procedure that apparently was permitted under Missouri state rules. Here the petitioner could not have injected the federal question into a motion for rehearing without rearguing the point already argued in his reply brief: that the trial court had not relied on the excluded equitable defenses, and neither should the appellate court. A motion for rehearing would have required petitioner to engage in ". . . a joinder of issue with the court as to the correctness of its conclusions upon points [already argued]." *Parker v. Baker, supra*, 847. An attempt to set up the federal question in a motion for rehearing would have required petitioner to violate the command of the Florida appellate rule.

The decision of the state appellate court was a panel decision. A motion for rehearing *en banc* in Florida is discretionary only and must be predicated upon a motion for rehearing directed to the panel deciding the appeal. Rule 9.331(c)(1), Florida Rules of Appellate Procedure. As noted above, such motion for rehearing would have been improper under Florida appellate practice. See also *Local 174, Teamsters, etc. v. Lucas Flour Company*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962).

Petitioner had no further opportunity to set up the federal question. The Florida Supreme Court's jurisdictional restrictions barred the Due Process argument on a petition

for discretionary review. And no rehearing of that court's decision to decline discretionary jurisdiction is permitted. Rule 9.330(d), Florida Rules of Appellate Procedure.

B. INADEQUACY OF STATE GROUNDS

At trial petitioner presented proof that the will contract had been executed by the parents and repudiated by the mother. The defenses tried were that the contract had not been signed by the mother; that if executed, the contract should be unilaterally revocable; and that the contract was mutually revoked by the parents.

On review the state appellate court held that the contract had been executed: "In 1979, James and Blanche Boyle, husband and wife, executed a document entitled 'Agreement to Make Will.'" Appendix, page 1a.

The main body of the state opinion is devoted to an explanation of the holding that the mutual will contract should be unilaterally revocable upon notice communicated to the other contracting party and the third party beneficiary. The opinion declares that the factual situation is unique to Florida law, and it draws primarily on out of state decisions to justify its conclusion that the contract is unilaterally revocable.

In a footnote at the end of the opinion, the appellate court holds that, even before the mother repudiated the contract, both parents had mutually revoked it in the form of a series of mutual and individual wills executed after the contract. All of the subject instruments, the will contract and the subsequent wills, were admitted into evidence as exhibits for both parties without objection. The interpretation of their terms was a matter of law for the court, and the standard of review in the state appellate court was whether the trial court had misapplied Florida law to

the established facts. See *Holland v. Gross*, 89 So.2d 255 (Fla. 1956).

Hence, whether the state grounds are adequate to support the appellate court's decision turns upon whether that court's explanation of Florida law is "plainly untenable", whether it is "so certainly unfounded that it properly may be regarded as essentially arbitrary", whether the purported nonfederal grounds put forward rest upon a substantial basis or are illusory. *Ward v. Board of County Commissioners*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1930); *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917); *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102 (1932). It is within the province of the Supreme Court to enquire into the adequacy of the purported state grounds for the decision below, *Lawrence v. State Tax Commission of Mississippi*, *supra*, and to examine state decisions in making that enquiry. See *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Texas v. Brown*, 460 U.S. 730, 732, n.2, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983).

1. ALLEGED UNILATERAL REVOCABILITY OF A WILL CONTRACT

As to the court's declaration that no Florida court had been presented with a repudiation of a mutual will contract by a living promisor, the court simply ignored the whole body of Florida contract and will contract case decisions.

It is the rule of general contract law in Florida that "one party to a contract cannot by himself rescind it." *Cox v. Grose*, 97 Fla. 848, 122 So. 513, 515 (1929). The repudiation of a contract by a party thereto before his time for performance has arrived is a breach of contract by anticipatory repudiation. *Hospital Mortgage Group v. First*

Prudential Development Corp., 411 So.2d 181 (Fla. 1982). Will contracts are treated according to the same principles as all other contracts. *Exchange National Bank of Tampa v. Bryan*, 122 Fla. 479, 165 So. 685 (1936). One party to a will contract cannot by himself rescind it. *Johnson v. Girtman*, 542 So.2d 1033 (Fla. 3rd DCA 1989); *In Re Estate of Shepherd*, 130 So.2d 888 (Fla. 2nd DCA 1961); *Somogyi v. Marosites*, 389 So.2d 244 (Fla. 5th DCA 1980). A will contract is irrevocable even though it does not contain a prohibition against revocation. *Keith v. Culp*, 111 So.2d 278 (Fla. 1st DCA 1959). In *Briggs v. Fitzpatrick*, 79 So.2d 848 (Fla. 1955), it was said that the period of limitations begins to run on a claim for breach of a will contract when one of the living parties repudiates it, not as of the later time of the death of that party.

For the enforceability of a contract, Florida makes no distinction between unilateral and bilateral performances, no distinction between a repudiation that occurs in an executory contract and in one that has been partially executed. Co-promisors are legally bound to their agreement where, in an *executory* contract, there are mutual promises exchanged between them for a future performance. *Jenkins v. City Ice & Fuel Co.*, 118 Fla. 795, 160 So. 215 (1935). That mutual exchange of promises is the consideration which makes the will contract binding. *Ugent v. Boehmke*, 123 So.2d 387 (Fla. 3rd DCA 1960). Where a will contract is repudiated by one party thereto during the lifetimes of both contracting parties, the contract will be enforced against the breaching party. *Donnelly v. Mann*, 68 So.2d 584 (Fla. 1953); *Farrington v. Richardson*, 153 Fla. 907, 16 So.2d 158 (1944); *Robinson v. Malik*, 115 So.2d 702 (Fla. 3rd DCA 1959).

In the state appellate opinion below, see appendix, page 4a, the court cited *Donner v. Donner*, 302 So.2d 452 (Fla. 3rd DCA 1974), for the proposition that a will contract *may* be irrevocable and said further that the will contract in the

instant case would not become a fixed obligation on the mother until her death. On the contrary, the *Donner* decision actually held that the will contract became binding and irrevocable when it was signed by the living promisors. *Id.*, 456. The court there expressly rejected the contention that the contract obligation would not ripen until the death of one of the promisors. *Id.*, 455, 459.

In a prior appeal between the parties to this action, the same state appellate court held that an allegation of an inter vivos transfer by one of the co-promisors to a will contract in fraud of the beneficiary's interest under the contract would state a cause of action for breach of the will contract, *Boyle v. Schmitt*, 578 So.2d 367 (Fla. 3rd DCA 1991), *rev. den.*, 587 So.2d 1329 (Fla. 1991).

Under Florida law a donee third party beneficiary of a will contract has a right to compel either promisor to fulfill his contractual obligation. *In Re Estate of Rosenstein*, 326 So.2d 239 (Fla. 3rd DCA 1976).

The state appellate court ignored this body of Florida law on will contracts, stating in effect that it was non-existent. Instead it drew on non-Florida case decisions to support its holding. But none of those decisions is apposite to its reasoning. For example, the court quoted from *Allen v. Dillard*, 15 Wash.2d 35, 129 P.2d 813, 820–821 (1942), for the proposition that a will contract is unilaterally revocable. It ignored the holding in that case, appearing at page 824 of the opinion therein, that the mere execution of mutual wills without more does not create a will contract. At page 820 of the decision, just preceding the quoted material, the Washington court said that wills are revocable, will contracts are not.

It appears that the state appellate court drew upon precedent unfamiliar to the Florida bench and bar as a

pretext to justify its foregone determination that petitioner was guilty of equitable misconduct, especially in view of its conclusion that, *"Any other result"*, would be harsh and inequitable.

2. ALLEGED MUTUAL RESCISSION OF THE WILL CONTRACT

Under the original terms of the will contract executed in 1979, the parents agreed to leave the bulk of their estates directly to petitioner. They executed several joint and mutual wills thereafter, each varying the terms of their testamentary arrangement somewhat for estate tax purposes. Transcript of Proceedings, 37–43. Each subsequent mutual instrument provided that the estate of the decedent parent would go to the surviving parent and upon the survivor's death, the bulk of the remainder would go to the petitioner. See appendix, page 2a. Each such modification was irrelevant to the basic obligation of the will contract in favor of the petitioner.

A will contract can be modified by mutual agreement of the contracting parties in whatever form they wish. *In Re Estate of Algar*, 383 So.2d 676 (Fla. 5th DCA 1980). A mutual will contract executed between parents providing that their estates shall go to the survivor of them both with the remainder to their son upon the death of the survivor is a binding and enforceable obligation. *Ugent v. Boehmke*, *supra*; *In Re Estate of Rosenstein*, *supra*; *Weiss v. Storm*, 126 So.2d 295 (Fla. 1st DCA 1961).

The parents also executed individual wills, which were admitted as exhibits at trial. Some of the mother's individual wills attempted to abrogate her contractual provision for the petitioner. To the extent that the individual will of a co-promisor to a will contract is inconsistent with the contract terms, it is that party's

unilateral act and is powerless to vary the contract terms. *Johnson v. Girtman, supra.*

The state appellate court's interpretation of the plain contract terms of the testamentary exhibits ignored the provision that each instrument declared leaving the remainder of the parents' estates to the petitioner. There was no instrument in evidence, as implied by the court's footnote 5 at appendix, page 6a, in which the parents mutually revoked the will contract. The appellate court's conclusion that the parents had mutually revoked the contract through those instruments finds no support in the evidence and is untenable under Florida law.

Parenthetically, assume for the sake of argument that the state appellate court correctly held that the parents had mutually revoked the will contract through these subsequent instruments. Such a holding would have been dispositive of the appeal. Why did the court indulge in the lengthy, and apparently gratuitous, dicta concerning the unilateral revocability of the will contract if that were the case? It would seem that the holding on unilateral revocability was a pretext to bolster the inadequate basis for the court's holding on mutual rescission of the will contract and an attempt to justify the actual basis for the decision: that the court was persuaded by respondents' unsupported charge of equitable misconduct.

This court should assume jurisdiction of this cause to correct the denial of procedural due process herein, a denial which the state appellate court has sought to mask with arguments that have no basis in Florida law.

CONCLUSION

The District Court of Appeal of Florida, Third District, expressly decided this case on the basis of an allegation of equitable misconduct for which there was no evidence offered or admitted at trial, any evidence thereon having been precluded by the trial court's pretrial order. It did so in violation of the Due Process Clause of the 14th Amendment to the United States Constitution. The state grounds expressed in the court's opinion to justify that denial of due process are so plainly untenable under Florida law as to be essentially arbitrary and pretextual.

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Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1992

CASE NO. 92-410

JOHN J. BOYLE,

Appellant,

vs.

LOUISE SCHMITT, etc., et al.,

Appellees.

Opinion filed July 14, 1992.

An Appeal from the Circuit Court for Dade County, Jon I. Gordon, Judge.

John J. Boyle, in proper person.

Robert M. Brake, for appellees.

Before SCHWARTZ, C.J., BARKDULL, and JORGENSON, JJ.

JORGENSON, Judge.

John Boyle appeals from a final judgment denying recovery in an action for breach of a contract to make a will. We affirm.

In 1979, James and Blanche Boyle, husband and wife, executed a document entitled "Agreement to Make Will." The agreement provided, in pertinent part, that:

> The parties hereby recite and declare that John J. Boyle, their son, has and is performing services necessary to maintain them in reasonable comfort and dignity by managing and maintaining their real and personal property.
>
> In consideration of the above services, James J. Boyle and Blanche E. Boyle, shall make a Will bequeathing and devising all their property to their son, John J. Boyle, escept [sic] that all their jewelry and household effects at 5895 S.W. 35 Street, Miami, Florida, shall go to their daughter, Louise Schmitt.

Simultaneously with the execution of the will agreement, Blanche and James Boyle executed a joint will in which each left all property to the survivor. Upon the death of the survivor, the property was to go to John Boyle with the exception of jewelry and household effects that were left to the daughter, Louise Schmitt.

During their marriage, the parties refinanced their jointly owned rental properties several times, drawing cash that they invested in municipal bonds. Eventually, the bond interest payments had to be used to meet the mortgage payments on the properties. In 1987, because of family difficulties, Blanche Boyle moved to California to live with her daughter and refused to contribute her share of the bond interest to the debt service on the properties. James Boyle sued for divorce and sought to have a constructive trust imposed on the bonds held by Blanche Boyle.[1] John Boyle, their son and plaintiff in this case, represented his father in the action against his mother. In the divorce proceeding, Blanche Boyle gave a deposition in which she expressly

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[1]The litigation over the bonds resulted in appeals to this court. *See e.g.*, Schmitt v. Boyle, No. 91-2649 (Fla. 3d DCA Apr. 28, 1992); Boyle v. Schmitt, 552 So. 2d 1158 (Fla. 3d DCA 1989).

repudiated the Agreement to Make a Will. She did not remember executing the document and testified that she never would have agreed to leave the bulk of her property to John, effectively disinheriting her daughter and a son by a previous marriage.[2] Blanche Boyle's repudiation of the will agreement was immediately communicated to James Boyle. In addition to representing his father against his mother in the divorce proceeding, John Boyle sued his mother and his father for breach of the agreement to make a will.[3] The son later dismissed the action against his father. When Blanche Boyle died in 1989, she left a will, executed in California in 1988, naming her daughter, Louise Schmitt, as personal representative and sole beneficiary.[4] John Boyle substituted his mother's estate as defendant in the breach of contract action and joined his sister as a party.

We affirm the trial court's judgment and hold that under these circumstances, Blanche Boyle properly revoked the contract to make a will. The third party beneficiary, John Boyle, is therefore not entitled to enforce the terms of that contract against either his sister or his mother's estate.

This court has held that "unlike a will which clearly is ambulatory in nature and therefore may readily be revoked by a competent testator, a contract to make a will *may* be

---

[2]John Boyle has stipulated that his mother repudiated the will agreement during the divorce proceeding.

[3]The litigation over the contract to make a will resulted in the following appeals to this court: Schmitt v. Boyle, 591 So. 2d 637 (Fla. 3d DCA 1991) (denial of petition for certiorari seeking review of order denying jury trial); Boyle v. Schmitt, 578 So. 2d 367 (Fla. 3d DCA) (reversal of trial court's orders dismissing two counts of son's complaints), *rev. denied*, 587 So. 2d 1329 (Fla. 1991); Schmitt v. Boyle, 558 So. 2d 1096 (Fla. 3d DCA 1990) (seeking review of orders granting leave to amend); Schmitt v. Boyle, 549 So. 2d 1019 (Fla. 3d DCA 1989) (same).

[4]The will provided in part: "Not being unmindful of my sons, John Boyle, who is now suing me, and Bruce Boyle. . . ."

irrevocable and therefore subject to specific enforcement by the courts." *Donner v. Donner*, 302 So. 2d 452, 455 (Fla. 3d DCA 1974), *cert. denied*, 314 So. 2d 151 (Fla. 1975) (emphasis added; citations omitted). Therefore, "[I]f the promisor breaches his agreement to make a devise or not to revoke a will, the beneficiary of the promise or the improperly revoked will may bring an action to enforce the terms of the agreement." *Johnson v. Girtman*, 542 So. 2d 1033, 1035 (Fla. 3d DCA 1989) (citations omitted). *See also Sharps v. Sharps*, 219 So. 2d 735 (Fla. 3d DCA) ("In a contract to make a will, the promisor has the right to change his will, and . . . the right being enforced against the promisor is the contract right, and not the will. . . ."), *cert. denied*, 225 So. 2d 920 (Fla. 1969); *In re Shepherd's Estate*, 130 So. 2d 888 (Fla. 2d DCA 1961) (mutual wills are ambulatory in nature and may be revoked; contract upon which mutual wills are made may be enforced depending upon circumstances); *Keith v. Culp*, 111 So. 2d 278 (Fla. 1st DCA) (same), *cert. denied*, 114 So. 2d 5 (Fla. 1959).

Until now, no Florida court has been presented with a case such as this, where a party to the agreement to make a will clearly and unequivocally revoked the agreement *prior* to death and communicated that revocation to both the other promisor and the third party beneficiary.

> An agreement to make mutual wills, or the execution of wills in pursuance of such an agreement, does not bind the testators to keep the property, covered thereby, for the intended beneficiaries under such wills, or prevent them from making such other disposition of it, either inter vivos or by will, as they may desire and mutually agree, while both or all are alive. *Moreover, while both or all of the parties to such an agreement are yet alive, any party may recede therefrom, and revoke his will or make a different disposition of*

> *his property, on giving proper notice to the other party or parties of his act in so doing*, or where such other or others have actual knowledge thereof; but a revocation or alteration of his will by one of the parties to such an agreement in secret, or without notice to, or the knowledge of, the other or others, although all are yet alive, does not release such party from his obligations under the agreement, and it remains enforceable against him.

Allen v. Dillard, 15 Wash. 35, ____, 129 P.2d 813, 820-821 (1942) (emphasis added; citations omitted). *See also Mitchell v. Marklund*, 47 Cal. Rptr. 756 (Cal. Dist. Ct. App. 1965) (divorced wife's repudiation of agreement to make a will released former husband of his obligations under agreement, where wife communicated repudiation by her conduct prior to death); *Church of Christ Home for Aged v. Nashville Trust Co.*, 184 Tenn. 629, ____, 202 S.W.2d 178, 181 (1947) ("It cannot be doubted that either party to the agreement [to make a will], while both are still alive, may recede therefrom and make a different disposition of his property upon giving proper notice of his act in doing so.") (citations omitted). *See generally*, 1 *Page On Wills* § 10.2 (3d ed. 1960 & Supp. 1992). In this case, it is undisputed that Blanche Boyle repudiated the agreement to make a will during her lifetime and communicated that revocation both to James Boyle, the other promisor, and to John Boyle, her son and third party beneficiary. Unlike the co-promisors and beneficiaries in the Florida cases construing contracts to make a will, James and John Boyle did not first learn of the repudiation after Blanche Boyle's death through a will that was inconsistent with the terms of the agreement to make a will, but during her lifetime through her unequivocal statements memorialized during her divorce from James Boyle. The reciprocal provisions of a joint will "constitute a contract between the parties *which is revocable by either during their joint lives by the giving of notice to the other*,

becoming a fixed obligation upon the death of either one without such notice." *Awramenko v. Awramenko*, 19 Misc. 2d 877, ____, 192 N.Y.S. 2d 15, 17 (N.Y. Sup. Ct. 1959) (emphasis in original). Blanche Boyle's agreement would not have become a fixed obligation until her death; until then, she was free to repudiate the agreement as long as she gave notice to her former husband and her son. Any other result would be harsh and inequitable, particularly in light of John Boyle's conduct against his mother following her move to California.[5]

In sum, we join those jurisdictions that have adopted the bright line rule that a party to a contract to make a will may repudiate that contract during her lifetime, provided that she gives notice of that repudiation to the co-promisor and the third-party beneficiary.

Affirmed.

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[5]Even if Blanche Boyle had not properly revoked the agreement to make a will, the *mutual revocations* by both parties to the agreement bar enforcement of the agreement to make a will. A contract to make a will may be modified or revoked by mutual agreement of the parties. In re Estate of Algar, 383 So. 2d 676 (Fla. 5th DCA), *rev. denied*, 389 So. 2d 1107 (Fla. 1980). Following the execution of the agreement and the mutual will, Blanche and James Boyle made subsequent wills, some jointly, and some individually. The wills did not conform to the agreement. Through execution of those wills that were inconsistent with their 1979 agreement to make a will, Blanche and James Boyle *both* revoked that agreement even before Blanche Boyle individually repudiated it in June, 1988.

Supreme Court of Florida

THURSDAY, NOVEMBER 12, 1992

DISTRICT COURT OF APPEAL,
3RD DISTRICT NO. 92-410

CASE NO. 80,297

JOHN J. BOYLE,

Petitioner,

v.

LOUISE SCHMITT, ETC., ET AL.

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

[SEAL]

/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

BH

cc: Hon. Louis J. Spallone, Clerk
Hon. Marshall Ader, Clerk
Hon. Jon I. Gordon, Judge

John J. Boyle, Esquire
Robert M. Brake, Esquire

Supreme Court, U.S.
FILED
MAR 2 1993
OFFICE OF THE CLERK

No. 92-1317

In the Supreme Court of the United States

October Term, 1992

JOHN J. BOYLE,

Petitioner,

v.s.

LOUISE SCHMITT, as Ancillary Personal Representative of the Estate of Blanche E. Boyle, deceased and LOUISE SCHMITT, Individually

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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TEXT OF

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution Article XIV Section 1

> ...nor shall any State deprive any person of life, liberty or property without due process of law.

Florida Constitution, Section 9, Article 1. Due process.

> No person shall be deprived of life, liberty or property without due process of law...

28 USC Section 1257 .

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari...where any title, right, privilege or immunity is specially set up or claimed under the Constitution... of...the United States

Florida Evidence Code Florida Statutes Section 90.401. Definition of Relevant Evidence.

> Relevant evidence is evidence tending to prove or disprove a material fact.

Florida Evidence Code Florida Statutes Section 90.402. Admissibility of Relevant Evidence.

> All relevant evidence is admissible, except as provided by law.

Federal Rules of Evidence (Rule 402). Relevant Evidence Generally Admissible, Irrelevant Evidence Inadmissable.

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Florida Rule of Appellate Procedure 9.030 (a) (2) (A) (v) Discretionary Jurisdiction.

> The discretionary jurisdiction of the Supreme Court may be sought to review
>
> (A) decisions of district courts of appeal that...
>
> (v) pass upon a question certified to be of great public importance.

Florida Rule of Appellate Procedure 9.120, Discretionary Proceedings.

> ...(d) Briefs on Jurisdiction. Petitioner's brief, limited solely to the issue of the Supreme Court's jurisdiction and accompanied by an appendix containing a conformed copy of the decision of the district court of appeal, shall be served within 10 days of filing the notice...

Florida Rule of Appellate Procedure 9.300. Motions

> (a) Contents of Motion; Response.
>
> Unless otherwise prescribed by these rules, an application for an order or other relief available under these

> rules shall be made by filing a motion therefor. The motion shall state the grounds on which it is based, the relief sought, argument in support thereof and appropriate citations of authority . . .

Florida Rule of Appellate Procedure 9.330

(a) Time for Filing; Contents; Reply.

> A motion for rehearing or for clarification of decision may be filed within 15 days of an order or within such other time set by the court. The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order. A reply may be served within lO day of service of the motion.

STATEMENT OF THE CASE

The Petitioner, John J. Boyle, as third party beneficiary, sought to enforce against his mother (and, after her death, her estate) a contract between his mother and father in which his parents mutually promised each other that each would make a will leaving the bulk of his or her estate to Petitioner. His mother, and later, his mother's estate, defended on the grounds, inter alia, that the contract was unilaterally revoked by her or, in the alternative, was revoked by the parents jointly. The estate advanced the following legal theories in support thereof:

1. Where the sole consideration for a contract to make a will is the mutual promises of each party to make a will in accordance with the terms of the contract, then any party to the contract may unilaterally rescind the contract while all parties are alive, so long as notice of the revocation is given to all other parties so as to enable them to change their testamentary dispositions accordingly. The parties stipulated that the mother made a statement of revocation of the contract and that said statement was communicated to the father during their joint lifetimes.

2. The parties to such a contract could mutually revoke the contract during their joint lifetimes. Execution of new mutual wills, or separate wills which were inconsistent with the terms of the contract and whose existence and contents were communicated to the other, constituted evidence of such a revocation agreement. Several such wills were introduced into evidence.

The trial court accepted these defenses and entered a judgment for the estate. The son appealed to the Third District Court of Appeal of Florida, which affirmed the trial court and wrote an opinion which covers six pages of the Appendix to the son's Petition for Certiorari.

In the penultimate paragraph of its Opinion the Court added to the last sentence thereof a parenthetical phrase commenting on the conduct of the son towards his mother, which conduct ostensibly formed the motive for her rescission of the contract.

The son has filed a Petition for Certiorari based upon his assertion that:

1. The parenthetical phrase describing his actions and his mother's motives constitutes a ruling on one of the mother's equitable defenses.

2. This equitable defense had been set aside by the trial court for a later hearing in the event that the Court ruled in favor of the son on the right to revocation issue.

3. As a result the son did not have a chance to present evidence as to whether his mother's motives were justified or if he was equitably estopped from enforcing the contract.

4. This inability to present such evidence constitutes a deprivation of his right to a hearing on this issue under the 14th Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

1. The issue of the mother's motive for rescinding the contract is irrelevant and immaterial to the questions before the courts below. The issues before the courts below were whether or not the mother had a right to make a unilateral rescission of the contract regardless of her motives, or whether a joint revocation was made by both parents. A litigant is not deprived of a constitutional right to a hearing by the rejection of irrelevant and immaterial evidence.

2. The son had six opportunities to present the question of motive to the courts below. The son used three of those six opportunities to comment on the fact that he had not had an opportunity to present evidence on that issue. At no time did he articulate any connection between such a lack of a hearing and the 14th Amendment to the Constitution of the United States. This Court therefore has no jurisdiction to grant a Writ of Certiorari in this cause because of the failure of the son to raise the Constitutional issue in the state court.

ARGUMENT

I. RELEVANCY AND MATERIALITY

Evidence on the issue of the mother's motive in unilaterally rescinding the contract was neither relevant nor material to the legal issues of the right to rescission.

Both the Federal Rules of Evidence (Rule 402) and the Florida Evidence Code (Florida Statutes Section 90.401 and 90.402) require that evidence must be relevant in order to be admissible.

It is black letter law that relevancy refers to the tendency to prove or disprove a material fact, and materiality refers to a fact which is in issue (29 Am Jur. 2d Evidence, Section 251, Page 299).

Facts and circumstances which do not throw any light upon the point in issue are not properly admissible in evidence and upon proper objection must be excluded (29 Am. Jur. 2d Evidence Section 251, Page 299 at 301, note 7 citing, inter alia, Bird v. United States, 180 US 356, 45 L. Ed. 570, 1 S.Ct. 403, and United States v. Corwin, 129 US 381, 32 L. Ed. 710, 9.S. Ct. 318). The test is one of logic as applied to each case (29 Am. Jur. 2d Evidence Section 252, Page 302; 23 Fla Jur 2d Evidence and Witnesses, Section 123, Page 150).

In the case at bar the material facts were admitted. The son stipulated that he was present when his mother repudiated the contract; that his father was alive at that time; and that the son communicated the repudiation to the father. The father, who is still living, testified that he learned of his wife's repudiation of the contract from his son while his wife was still alive.

In addition, inconsistent wills executed by the parents after the execution of the contract were admitted into evidence.

The question before the court then became: As a matter of law was the contract effectively repudiated?

The motive of the mother was not material to the legal issues. The motive of the mother was not relevant to the facts, since motive could neither prove nor disprove repudiation. Having decided that the right of repudiation existed, and that it was exercised, the court properly ignored the son's request for a hearing on facts concerned with motive.

Inability to present irrelevant and immaterial evidence has never been held to be a deprivation of due process under the 14th Amendment. Therefore, the petitioner/son has not been deprived of due process in this case.

2. RAISING THE QUESTION IN STATE COURT.

a. The Petitioner/son had six opportunities to present his objection to consideration of his mother's motive in repudiating the contract. He availed himself of three of these opportunities. At no time did he mention the 14th Amendment to the United States Constitution. As a result, this Court has no jurisdiction to grant his petition because he failed to raise the issue in state court.

i. First Opportunity: His Reply Brief

In the statement of facts in its Answer brief to the Third District Court of Appeal of Florida, the Estate recited the son's participation in his father's dissolution action, citing the pages of the appellate record where those facts appeared.

In its argument in said brief the estate made the statements quoted and cited by Petitioner on pages 4 and 5 of his brief.

John J. Boyle then filed a Reply Brief in the 3rd District Court of Appeal in which he devoted 27 lines, or approximately 270 words, answering those statements and objecting to the consideration of those statements. Although the argument is identical to the argument raised in the Petition to this Court as a federal question, nowhere in that passage does he mention the 14th Amendment or the fact that the statements raise a federal, as well as a state, question.

ii. Second Opportunity: Motion to Strike

Florida Rule of Appellate Procedure 9.300 provides for liberal motion practice. The rule is set out in 387 So. 2d 920 and 32 Florida Statutes Annotated 623. John J. Boyle could have filed a Motion to Strike those portions of the estate's brief and to limit argument on the issues based, inter alia, on the 14th Amendment and Federal grounds. He failed to do s o .

iii.Third Opportunity: Oral Argument

The matter was brought up again during oral argument. At that time John J. Boyle could have cited the 14th Amendment and argued that the matter was a federal question. He failed to do so.

iv. Fourth Opportunity: Motion For Rehearing

Florida Rule of Appellate Procedure 9.330 (32 Florida Statutes Annotated 639) authorizes the filing of a Motion for Rehearing or Clarification. The Rule provides that

> "The motion shall state with particularity the points of law or fact which the Court has overlooked or misapprehended. The motion shall not reargue the merits of the Court's Order."

John J. Boyle could have pointed out the 14th Amendment and the federal question to the Court in such a motion, as the Petitioner did in the case of Brinkerhoff-Faris Trust and Savings Co. v. Hill, 1930, 281 US 673, 50 S.Ct. 451 74 L. Ed. ,1107, cited by John J. Boyle on page 7 of his Petition. John J. Boyle failed even to file a Petition for Rehearing.

v. Fifth Opportunity: Petition For Certification To Supreme Court of Florida .

Florida Rule of Appellate Procedure 9.030 (a) (2) (A) (v) [32 Florida Statutes Annotated 349] allows the various District Courts of Appeal to certify questions to the Supreme Court as being of great public interest. The litigants may request such a certification by motion. Had John Boyle wished to do so he could have filed such a motion and included in it a 14th Amendment argument. He failed to do so.

iv. Sixth Opportunity: Petition for Discretionary Hearing by Supreme Court of Florida

Florida Rule of Appellate Procedure 9.120, "Discretionary Proceedings to Review Decisions of District Courts of Appeal" (32 Florida Statutes Annotated 478), provides that a party may invoke the discretionary jurisdiction of the Florida Supreme Court by filing a Notice and a brief limited solely to the issue of the Supreme Court jurisdiction. John Boyle filed such a Notice and Brief.

In his brief on jurisdiction, John J. Boyle raised the motive issue by stating (page 9):

> "The district court parenthetically gave two other bases for its decision: (1) that the will contract had been mutually rescinded (Appendix, 6: N. 5); and (2) that the Petitioner was guilty of inequitable conduct. (Appendix 6).
>
> "...(N)o evidence was taken at trial on the defenses of the petitioner's alleged inequitable conduct. The District Court improperly considered (this) defense( ) without a record basis."

John J. Boyle thus raised the due process issue in his brief but failed to mention the 14th Amendment or the federal question.

b. John J. Boyle thus finds himself in the position of the Petitioner in the case of Webb v. Webb, 1981, 451 US 493, 101 S.Ct. 1889, 68 L. Ed. 2d 392. In that case Petitioner sought review by certiorari of a decision of the Georgia Supreme Court on the question of whether Article IV, Section 1 of the United States Constitution required that Georgia give full faith and credit to a Florida custody decree.

This Court there noted that 28 USC Section 1257 required Petitioner to have specially set up in the Court below her claim to any right under the Constitution of the United States; that nowhere in the record before the Georgia Court was the federal question or constitution mentioned, let alone passed upon; and that although Petitioner did use the phrase "full faith and credit" at several points before the Georgia Court, she did not cite the Federal Constitution or any cases relying on the full faith and credit clause of the Federal Constitution, but instead relied upon the Uniform Trial Custody Jurisdiction Act, adopted by both Georgia and Florida.

This Court then referred to a long history of cases where the Court refused to decide Federal Constitutional issues raised in this Court for the first time on review of State Court decisions; and held that, to raise the Federal question in a case where the question could be decided under either State or Federal law, one must mention the Federal Constitution and make a claim specifically referring to it. This Court then denied certiorari.

The same result should obtain in the case at bar for the same reasons. Since Section 9, Article 1 of the Florida Constitution contains a due process clause which tracks the Fourteenth Amendment to the Federal Constitution, this Court

> "... cannot conclude on this record that Petitioner raised the federal claim that ()he now presents to this Court at any part in the state Court proceedings." Webb v. Webb 101 S. Ct. 1889 at 1892,

but can only

> "...find it far more likely that Petitioner was referring to State law." Webb v. Webb, 101 S. Ct. 1889 at 1893.

In the case at bar there are no policy considerations sufficient to overrule the

> "...powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts." Webb v Webb, 101 S. Ct. 1889 at 1893.

On the contrary, the statements concerning John J. Boyle's treatment of his mother were in the record before the Court and were argued by him in his brief and in his oral argument. They had the function only of supplying a motive for his mother's conduct. Such motive was irrelevant and immaterial to the issue before the Court; was mentioned peripherally and only in passing by the Court; and did not affect the legal principle followed by the Court.

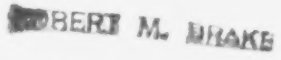
That legal principle had a long and honorable history dating to the English Common Law before the American Declaration of Independence, and had been adopted by several other states without a Constitutional challenge.

If any injustice has been done to Petitioner, it is not so egregious as to warrant an overriding of the statutory prohibition against the assumption of jurisdiction in cases where the federal question was not raised in the Court below.

CONCLUSION

The point raised by Petitioner was irrelevant and immaterial to the issue before the Court. In addition, Petitioner failed to raise any federal question in the Court below. The record in this case does not disclose any fundamental unfairness requiring review by this Court. The Petition for Certiorari should be denied.

Respectfully submitted,



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Respondents.

On Petition For Writ Of Certiorari to the District Court Of Appeal Of Florida, Third District

PETITIONER'S REPLY BRIEF

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On Petition For Writ Of Certiorari to the District Court Of Appeal Of Florida, Third District

PETITIONER'S REPLY BRIEF

ARGUMENT IN REPLY

1. THE FEDERAL QUESTION.

The Petition For Certiorari argues that the state appellate court improperly decided this case on the basis of the petitioner's alleged misconduct against his mother,

where evidence of such misconduct was excluded from the trial. The Brief In Opposition responds as follows:

> In the penultimate paragraph of its Opinion the [state appellate court] added to the last sentence thereof a parenthetical phrase commenting on the *conduct of the son towards his mother,* which conduct ostensibly formed the motive for her rescission of the contract. (Emphasis added). *Id.*, 1.
>
> Evidence on the issue of the mother's motive in unilaterally rescinding the contract was neither relevant nor material to the legal issues of the right to rescission. *Id.*, 3.
>
> Having decided that the right of repudiation existed, and that it was exercised, the [trial] court properly ignored the son's request for a hearing on facts concerned with motive. *Id.*, 4.

It was the respondent's affirmative defenses in the answer that alleged the petitioner's misconduct toward his mother, and it was the respondent, not the petitioner, who sought to introduce evidence thereon which was excluded by the trial court. The affirmative defenses averred that the alleged misconduct excused the mother's contractual obligation toward petitioner.

Which party sought to introduce evidence on the alleged misconduct is not important to this court's jurisdiction. What is significant here is that respondent concedes these matters were not in evidence.

Yet the state appellate court declared that its decision against petitioner could not be otherwise in light of such matters. Therein lies the deprivation of due process, for the petitioner had no occasion or opportunity to introduce

rebuttal evidence to such matters. See *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917).

2. RAISING THE FEDERAL QUESTION.

The Brief In Opposition argues that petitioner failed to seize several opportunities to raise the federal question:

> The first three so-called opportunities — the reply brief, a motion to strike, and oral argument in the state appellate court — were all pre-decision. That the state appellate court would base its decision on non-record matters was not revealed until its opinion was issued. Prior to that petitioner "was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance." *Saunders v. Shaw, supra*, 320.
>
> Incidentally, the matter of petitioner's alleged misconduct against his mother was not brought up at oral argument, but the state appellate court makes no transcript of oral argument.

Respondent argues that after the state appellate decision was issued, petitioner had the opportunity to set up the federal question by moving the appellate court to certify to the Florida Supreme Court that its decision on petitioner's alleged misconduct constituted a question "of great public importance." See Rule 9.030(a)(2)(A)(v), Fla.R.App.P.

As a matter of practice, certification is used in Florida to present unresolved issues of law to the state Supreme Court. See, for example, *Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533 (Fla. 1987) (right of privacy to be afforded a potential AIDS victim). *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So.2d 921 (Fla.

1984) ("right to die" issues). The denial of due process herein is not a pure question of law, but requires reference to the record's absence of a basis for the appellate court's decision.

Such a motion would have been a subterfuge for a motion for rehearing and would have been subject to sanctions. To ask the appellate court to certify to the state Supreme Court that it had denied petitioner due process in relying on non-record matters would have required petitioner to take issue with the appellate court as to the correctness of its conclusion upon this point already raised in the reply brief. As the Petition For Certiorari shows, Florida appellate rules prohibit such a practice.

Respondent argues that petitioner should have set up the federal question in his jurisdictional brief to the Florida Supreme Court. The basis for petitioner's jurisdictional brief to that court was that the appellate court's expression of unilateral revocability of a will contract was in direct conflict with other Florida appellate decisions. Petitioner stated that upon a consideration on the merits, the Florida Supreme Court would find no record basis for mutual rescission of the will contract or for the appellate court's consideration of petitioner's alleged misconduct.

But those other bases for the decision could not establish jurisdiction in the Florida Supreme Court. In a jurisdictional brief there is no opportunity to argue a non-jurisdictional issue. The first opportunity to raise and argue the merits of a non-jurisdictional issue is in a brief on the merits. An opportunity to raise the federal question means that raising it must be of some potential efficacy. Here the federal question could not possibly have formed the basis for state Supreme Court jurisdiction (as set out on pages 7 and 8 of the Petition For Certiorari), so the jurisdictional brief to that court presented no opportunity to raise the federal question.

Petitioner's reference in his jurisdictional brief to the non-jurisdictional matters was superfluous. In *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977), the non-jurisdictional issues in contention were not raised in the brief on jurisdiction. The court said that if conflict appears and it agrees to accept jurisdiction on that basis, it has a duty at that time to consider non-jurisdictional issues. "Once we take jurisdiction because of conflict on one issue, we may decide all issues." *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530, 531 (Fla. 1985).

At that time petitioner would have had his first opportunity to present the merits of his due process argument and to set up the federal question. But the Florida Supreme Court declined jurisdiction, and the opportunity never arose.

3. INADEQUACY OF STATE GROUNDS.

Respondent argues that a mutual will contract should be unilaterally revocable in Florida. Nowhere in the Brief In Opposition does respondent point to a single authority in support of the adequacy of that state ground to sustain the state appellate court's decision: indeed, there are no such authorities.

Respondent states that several wills were introduced into evidence to support the argument that petitioner's parents mutually revoked the will contract relied on by petitioner. In the appendix attached hereto are copies of the will contract and all the wills introduced into evidence at the trial.

The will contract provides that each parent will bequeath the bulk of his estate directly to petitioner. *Appendix 1.* The Joint Will of 1979 provides that each parent will leave such estate to the survivor of them both,

with the remainder to the petitioner. *Appendix 2.* The mutual wills of 1981 make the same provision, excepting a fraction of such estate for estate tax purposes. *Appendix 3.* The mutual wills of 1982 make the same provision as the mutual wills of 1981, the estate tax provision being more professionally drawn. *Appendix 4.* The individual will of the father of 1987 leaves his entire estate to the petitioner. *Appendix 5.* The individual will of the mother of 1985 leaves her real property estate to the father for life, with the remainder to the petitioner. *Appendix 6.*

That the above will provisions are consistent with the will contract, and not in contravention of its terms, is supported by the Florida decisions cited on page 14 of the Petition For Certiorari. Respondent cites this court to no authority to support the statement on page 1 of the Brief In Opposition that the above wills were expressions of mutual rescission of the will contract.

In addition, the mother's will of 1987 attempts to revoke her obligation to petitioner under the will contract. *Appendix 7.* And the mother's last will of 1988 makes a similar attempt. *Appendix 8.* As cited on page 15 of the Petition For Certiorari, Florida law does not permit the individual will of a co-promisor to a will contract to vary the terms of such contract.

CONCLUSION

It is uncontroverted that the state appellate court based its decision upon matters that were not in evidence. That decision came late in the proceedings, and petitioner was afforded no opportunity thereafter to set up such violation of due process as a federal question. Respondent makes no argument to support the state grounds for the decision below. An arbitrary decision should not be allowed to stand.

John J. Boyle
Petitioner
5895 S.W. 35th Street
Miami, Florida 33155
Phone: (305) 665-8439

Appendix

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[Filed 2/19 A.D. 1992]

Case No. 88-13866

AGREEMENT TO MAKE WILL

AGREEMENT made at Miami, Florida, between James J. Boyle and Blanche E. Boyle, husband and wife.

The parties hereby recite and declare that John J. Boyle, their son, has and is performing services necessary to maintain them in reasonable comfort and dignity by managing and maintaining their real and personal property.

In consideration of the above services, James. J. Boyle and Blanche E. Boyle, shall make a Will bequeathing and devising all their property to their son, John J. Boyle, escept that all their jewelry and household effects at 5895 S.W. 35 Street, Miami, Florida, shall go to their daughter, Lousie Schmitt.

James J. Boyle and Blanche E. Boyle further agree not to revoke the Will executed prusuant to this Agreement furing their lffe.

Dated this 23rd day of August, 1979.

/s/ James J. Boyle

/s/ Blanche E. Boyle

On the date alst above written, James J. Boyle and Blanche E. Boyle, known to us to be the persons showse signatures appear at the end of the foregoing Agreement, signed the agreement in our presence and at their requ4st and in their presence and in the presence of each other, we now sign our names as attesting witnesses.

/s/ [ILLEGIBLE] 5704 Bird Rd.

/s/ [ILLEGIBLE] 5704 Bird Rd.

/s/ [ILLEGIBLE] 5704 Bird Rd.

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

[Filed 2/19 A.D. 1992]

Case No. 88-13866

JOINT WILL

We, James J. Boyle and Blanche E. Boyle, husband and wife, residing at 5895 S.W. 35th Street, , Miami, Dade County, Florida, hereby make and publish this our Joint Last Will and Testament, revoking all prior Wills by us at any time made.

1. We give, devise and bequeath our entire estate of every kind and wheresoever situated to the survivor.

2. At the time of the death of the survivor, we hereby give, devise and bequeath to our daughter, Louise Schmitt, all our jewelry and household effects.

3. At the time of the death of the suvivor, we hereby give, devise and bequeath the balance of our entire estate of every kind and wheresoever situated to our son, John J. Boyle.

4. We urge our son, John J. Boyle, if necessary, to care for and assist our daughter, Louise Schmitt, and our son, BRuce Boyle.

5. We hereby agree with each other that each of us shall abide by the joint Will hereby made, and shall not make any Will or Codicil different from or contrary to the provisions of this Will after the death of either of us; and each of us further agrees that this, our Last Will and Testament cannot be changed or varied by either of us without the express written consent of the other.

6. We appoint our son, John J. Boyle, as Executor of this our Last Will and Testament giving to him the fullest powers permitted by law. He shall serve without bond or other security.

IN WITNESS WHEREBY, we have signed and published this our Last Will and Testament this 23rd day of August, 1979.

/s/ James J. Boyle

/s/ Blanche E. Boyle

The foregoing instrument was on the date thereof by James J. Boyle and Blanche E. Boyle, his wife, subsribed, published and declared to be their Last Joint Will and Testament in the presence of us, and each of us, who at thier request and in their presence and in the presence of each of us, who at thier request and in their presence and ofeach other have signed the same as witnesses theretol

/s/ [ILLEGIBLE] 5704 Bird Rd.

/s/ [ILLEGIBLE] 5704 Bird Rd.

/s/ [ILLEGIBLE] 5704 Bird Rd.

State of Florida
County of Dade:

We, James J. Boyle and Blanche E. Boyle, the testators and the witnesses respectively, whose names are signed to the foregoing instrument, having been sworn, declared to the undersigned officer that they, and each of them and that each of the witnesses, in the presence of the testators and in the presence of each other, signed the Will as a witness.

/s/ James J. Boyle

/s/ Blanche E. Boyle

Testators

/s/ [ILLEGIBLE]

/s/ [ILLEGIBLE]

/s/ [ILLEGIBLE]

Subscribed and sworn to before me, on the 23 day of August, 1979.

/s/ [ILLEGIBLE]
NOTARY PUBLIC, STATE
OF FLORIDA AT LARGE
MY COMMISSION
EXPIRES JULY 10, 1983
BONDED THRU
GENERAL INS.
UNDERWRITERS

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

[Filed 2/19 A.D. 1992]

Case No. 88-13866

WILL OF JAMES J. BOYLE

I, James J. Boyle, now domiciled in the City of Miami, Dade County, Florida, declare this to be my last will. I revokeall other wills and codicils that I may previously have made.

ARTICLE 1.

My debts and expenses of my last illness, funeral, and administration of my estate shall be paid by my executor from the principal of my residuary estate as soon as practicable after my death.

ARTICLE 2.

All inheritance, estate, and succession taxes (including interest and penalties thereon but not including any generation skipping tax) payable by reason of my death shall be paid out of and be charged generally againstthe principal of my residuary estate which is not included in the share qualifying for the marital deduction, without reimbursement from any person. This provision is not a waiver of any right which my executor has to claim reimbursement for any such taxes which become payable on account of any property over which I have a power of appointment.

ARTICLE 3.

I bequeath all my person effects,household goods, and similar property not otherwise effectively transferred (such as jewelry, clothing, automobiles, furniture and furnishings, silver, books, and pictures) to my wife, Blanche E. Boyle, if she survives me for thirty days. If she does not so survive me, I bequeath such property to my son,John J. Boyle, if he survives me for thirty days.

ARTICLE 4.

I devise and bequeath all of my residuary estate bein all property,wherever situated, in which I may have any interest at the time of my death not otherwise effectively disposed of, but not including any property over which I may have a power of appointment, to my executor to be administered and disposed of as hereinafter provided:

1. If my wife survives me, my executor shall divide my residuary estate into two separate trusts,

(a) One trust (Trust A) shall be that fraction of my entire residuary estate which will secure for my estate the maximum marital deduction allowable for federal estate tax purposes,excluding, however, any increase due solely to the generation skipping tax provisions. The numerator of this fraction shall be the greater of (i) $250,000 or (ii) one-half of my adjusted gross estate (as defined in the Internal Revenue Code, but excluding any property so included under the generation skipping trust provisions) less the value of all property finally allowed as a marital deduction for property passing to my wife other than under this Article. The denominator of such fraction shall be the value of my entire residuary estate. In determining such fractional share, assets shall be valued at hgeur values as finally determined for federal tax purposes.

(b). The remaining fraction of my residuary estate shall be called "Trust B."

(c) Both trusts, or if my wife does not survive me, my entire residuary estate, shall be allocated, conveyed, transferred, and delivered to my trustee, upon the trusts set forth below.

(d) My executor shall have completediscretion in the distribution of assets to the respective trusts and the values used for such purposes, except that no asset or the proceeds of sale thereof shall be distributed to Trust A

which would not qualify for the marital deduction. Unproductive property shall not be held as an asset of Trust A for more than a reasonable time during the life of my wife without her consent.

2. (a) The trustee shall pay all the net incomeof Trust A to my wife in convenient installments at least as often as quarter-annually during her life.

(b) Whenever the trustee determines that the income of my wife from all sources known to the trustee is not sufficient for her reasonable support and comfort, the trustee shall pay to her, or use for her benefit, such sums as the trustee determines to be required for those purposes from the principal of Trust A or the principal and income of Trust B, as the trustee selects. In addition, the trusteemay in its discretion pay to, or use for the benefit of, my son, John J. Boyle so much of the income and principal of Trust B as the trustee determines to be required for the reasonable support, comfort, and education of my son, John J. Boyle.

(c) Upon the death of my wife after my death, the trustee shall distribute Trust A, as then constituted, to such person or persons, or my wife's own estate, upon such conditions and estate, in

trust or otherwise, with such powers, in such manner and at such time or times as she appoints and directs by will specifically referring to the power of appointment. To the extent that my wife does not effectively exercise her power of appointment, Trust A shall upon the death of my wife be added to and commingled with Trust B and distributed in whole, as if it had been an original part of Trust B, to my son, John J. Boyle. I am making no provision for my stepson, Bruce Michael Boyle, my daughter, Louise A. Schmitt, my grandson,Joseph Roger Schmitt, andthe unborn child of my daughter, Louise A. Schmitt (due to be born in December, 1981). However, if my son John J. Boyle, in his discretion, determines that the income of the above

unprovided for stepchild, daughterand grandchild, and undorn grandchild, from all sources known to John J. Boyle is not sufficient for their reasonable support, comfort,and education, and that of their immediate family, John J. Boyle in his discretion may pay to them or use for their benefit, so much of the income and principal of the trustas he determines to be required for thoses purposes.

ARTICLE 5.

1. No interest under this instrument shall be transferable or assignable by any beneficiary, orbe subject during his life to the claims of his creditors.

2. The trustee shall not be required to obtain authority or approval of any court in the exercise of any power permitted under this instrument. The trustee shall not be required to file accountings with any court.

ARTICLE 6.

1. I appoint my wife, Blandhe E. Boyle, and my son, John J. Boyle, as executors and trustees of this Will.

2.My executors and trustees shall not be required to give any bond for the performance of their duties.

3.Of the order of my death and that of my wifecannot be established by sufficient evidence, for purposes of this instrument my wife shall be deemed to have survived me.

I give my personal representative and trustees, my wife, Blanche E. Boyle, and my son, John J. Boyle, the fullest powers and -authority in all matters and questions, to do all acts which I might or could do if living.

IN WITNESS WHEREOF, I hereunto sign my name, and publish and declare this to be my Last Will and Testament in the presence of the persons witnessing it at my request this 20th day of April, 1981.

/s/ James J. Boyle SEAL
James J. Boyle

WE HEREBY CERTIFY that the foregoing instrument was on the day and date hereof signed, sealed, published and declared by the Testator, James J. Boyle, as and for his Last Will and Testament, in our presence, who, at his request, in his presence in the presence of each other, have subscribed our names hereto as witnesses of the execution thereof, believing said Testator, at the time of so signing, to be of sound mind and memory.

/s/ [ILLEGIBLE] residing at 6430 Sw 58th pl.

/s/ [ILLEGIBLE] residing at 312 S.W. 76 ct.

/s/ [ILLEGIBLE] residing at 6140 Sw 38 St

STATE OF LORIDA)
) SS.
COUNTY OF DADE) +

WE. ,James J. Boyle, and the above witnesses respectively, being first duly sworn, do hereby declare to the undersigned officer that the Testator signed this instrument as his Last Will and Testament, and that he signed voluntarily, in the presence of the above witnesses, and that each of the witnesses,in the presence of the Testator, at his request, and in the presence of each other, signed the will as a witness and that to thebest of their knowledge he was of sound mind and under no constraint or undue influence.

/s/ James J. Boyle
JAMES J. BOYLE

/s/ [ILLIGIBLE]
Witness

/s/ [ILLIGIBLE]
Witness

/s/ [ILLIGIBLE]
Witness

SUBSCRIBED AND ACKNOWLEDGED before me by James J. Boyle, the Testator, and subscribed and sworn to before me by him and the above witnesses, on the 20th day of April,1981.

/s/ [ILLIGIBLE]
NOTARY PUBLIC State of Fla. at large.

My commission expires:
Notary Public, State of Florida at Large
My Commission Expires Nov. 25, 1983

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

[Filed 2/19 A.D. 1992]

Case No. 88-13866

WILL OF BLANCHE E. BOYLE

I, Blanche E. Boyle, now domiciled in the City of Miami, Dade County, Florida, declare this to be my last will.I revoke all other wills and codicils that I may previouslyhave made.

ARTICLE 1

My debts and expenses of my last illness, funeral, and administration of my estate shall be paid by my executor from the principal of my residuary estate as soon as practicable after my death.

ARTICLE 2

All inheritance, estate, and succession taxes (including interest and penalties thereon but not including any generation skipping tax) payable by reason of my death shall be paid out of and be charged generally against the principal of my residuary estate which is not included in the share qualifying for the marital deduction, without reimbursement from any person. This provision is not a waiverof any right whcih my executor has to claim reimbursement for any such taxes which become payable on account of any property over which I have a power of appointment.

ARTICLE 3

I bequeath all my personal effects, household goods, and similar property not otherwise effectively transferred (such as jewelry, clothing, automobiles, furniture and furnishings, silver books, and pictures) to my husband., James J. Boyle, if he survives me for thirty days. If he does not so survive me, I bequeath such property to my son, John J. Boyle, if he survives me for thirty days.

ARTICLE 4

I devise and bequeath all of my residuary estate, being all property, wherever situated, in which I may have any interest at the time of my death not otherwise effectively disposed of, but not including any property over which I may have a power of appointment, to my executor to be administered and disposed of as hereinafter provided:

1.If my husband survives me, my executor shall divide my residuary estate into two separate trusts,

(a) One trust (Trust A) shall be that fraction of my entire residuary estate which will secure for my estate the maximum marital deduction allowable for federal estate tax purposes, excluding, however, any increase due solely to the generation skipping tax provisions. The numerator of this fraction shall be the greater of (i) $250,000 or (ii) one-half of my adjusted gross estate (as defined in the Internal Revenue Code, but excluding any property so included under the generation skipping trust provisions) less the value of all property finally allowed as a marital deduction for property passing to my HUSBAND other than under this Article. The denominator of such fraction shall be the value of my entire residuary estate. In determining such fractional share, assets shall be valued at their values as finally determined for federal tax purposes.

(b). The remaining fraction of my residuary estate shall be called "Trust B.)

(c). Both trusts, or if my husband, James J. Boyle, does not survive me, my entire residuary estate, shall be allocated, conveyed, transferred, and delivered to my trustee, upon the trusts set forth below.

(d). My executor shall have complete discretionin the distribution of assets to the respective trusts and the values used for such purposes, except that no asset or the proceeds of sale thereof shall be distributed to Trust A

which would not qualify for the marital deduction. Unproductive property shall not be held as an asset of Trust A for more than a reasonable time during the life of my husband, James J. Boyle, without his consent.

2. (a) The trustee shall pay all the net income of Trust A to my husband, James J. Boyle, in convenient installments at least as often as quarter-annually during his life.

(b). Whenever the trustee determines that the income of my husband, James J. Boyle, from all sources known to the trustee is not sufficient for his reasonable support and comfort, the trustee shall pay to him, or use for his benefit,such sums as the trustee determines to be required for those purposes from the principal of Trust A or the principal and income of Trust B, as the trustee selects. In addition, the trustee may in his discretion pay to, or use for the benefit of my son, John J. Boyle, so much of the income and principal of Trust B as the trustee determines to be required for the reasonable support, comfort, and education of my son, John J. Boyle.

(c) Upon the death of my husband, James J. Boyle, after my death, the trustee shall distribute Trust A, as then constituted, to such person or persons, or my husband's own estate, upon such conditions and estate, in trust or otherwise, with such powers, in such manner and at such time or times as he appoints and directs by will specifically referring to the power of appointment. To the extent that my husband, James J. Boyle, does not effectively exercise his power of appointment, Trust A shall upon the death of my husband be added to and commingled with Trust B and distributed in whole, as if it had been an original part of Trust B, to my son, John J. Boyle.

(d). I am making no provision for my son, Bruce Michael Boyle, my daughter,Louise A. Schmitt, my grandson, Joseph Roger Schmitt, my grandson, James Yot Boyle, and the unborn child of my daughter, Louise A.

Schmitt (due to be born in December! 198I. However, if my son, JohnJ. Boyle, in his discretion, determines that the income of the above unprovided for children and grandchildrenis not sufficient for their reasonable support, comfort, and education, and that of their immediate family, John J. Boyle in his discretion may pay to them or use for their beenfit, so much of the income and principal of the trust as he determines to be required for those purposes.

ARTICLE 5

1. No interest under this instrument shall be transferable or assignable by any beneficiary, or be subject during his life to the claims of his creditors.

2. The trustee shall not be required to obtain authority or approval of any court in the exercise of any power permitted under this instrument. The trustee shall not be required to file accountings with any court.

ARTICLE 6

1. I appoint my husband, James J. Boyle, and my son, John J. Boyle, as executors and trustees of this Will.

2. My executors and trustees shall not be required to give any bond for the performance of their duties.

3. If the order of my death and that of my husband cannot be established by sufficient evidence, for purposes of this instrument my husband shall be deemed to have survived me.

4. I give my personal representative and trustees, my husband,James J. Boyle, and by son, John J. Boyle, the fullest powers and authority in all matters and questions, to do all acts which I might or could do if living.

IN WITNESS WHEREOF, hereunto sign my name, and publish and declare this to be my Last Will and Testament in the presence of the persons witnessing it at my request this 21st day of April, 198I.

/s/ Blanche E. Boyle SEAL
BLANCHE E. BOYLE

WE HEREBY CERTIFY that the foregoing instrument was on the day and date hereof signed, sealed, published and declared by the Testator, Blanche E. Boyle, as and for her Last Will and Testament, in our presence, who, at her request, in her presence in the presence of each other, have subscribed our names hereto as witnesses of the execution thereof, believing said Testator, at the time of signing, to be of sound mind and memory.

/s/ [ILLEGIBLE] residing at 6430 Sw 58th pl.

/s/ [ILLEGIBLE] residing at 6140 Sw 38 St

/s/ [ILLEGIBLE] residing at 5900 Bird Rd.

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

We, Blanche E. Boyle, and the above witnesses respectively, being first duly sworn, do hereby declare to the undersigned officer that the Testator signed this instrument as her Last Will and Testament, and thatshe signed voluntarily, in the prescence of the above witnesses, and that each of the witnesses, in the presence of the Testator, at her request, and in the presence of each other, signed the will as a witness and that to the best of their knowledge she was of sound mind and under no constraint or undue influence.

/s/ Blanche E. Boyle
BLANCHE E. BOYLE

/s/ [ILLIGIBLE]
WITNESS

/s/ [ILLIGIBLE]
WITNESS

/s/ [ILLIGIBLE]
WITNESS

SUBSCRIBED AND ACKNOWLEDGED before me by the said Blanche E. Boyle, the Testator, andby the Witnesses above, on this 21st day of April, 198I.

/s/ Nancy E. Handley
NOTARY PUBLIC. State of Florida at Large.

My commission expires:
Notary Public, State of Florida at Large
My Commission Expires Nov. 25, 1983

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

[Filed 2/19 A.D. 1992]

Case No. 88-13866

LAST WILL AND TESTAMENT

OF

JAMES J. BOYLE

I, JAMES J. BOYLE, domiciled in Dade County Florida, hereby revoke all other Wills and Codicils which I have heretofore made.

ARTICLE I
TAXES AND EXPENSES

My Personal Representative shall pay all expenses of my last illness and funeral, costs of administration including ancillary, costs of safeguarding and delivering devises, and other proper charges against my estate. My Personal Representative shall pay from the residue of my estate all estate and inheritance taxes assessed by reason of my death, except that the amount, if any, by which the estate and inheritance taxes shall be increased as a result of the inclusion of property in which I may have a qualifying income interest for life or over which I may have a power of appointment shall be paid by the person holding or receiving that property. Interest and penalties concerning any tax shall be paid and charged in the same manner as the tax. I waive all rights of reimbursement for any payments made pursuant to this Article.

My Personal Representative's selection of assets to be sold to make the foregoing payments or to satisfy any pecuniary devises, and the tax effects thereof, shall not be subject to question by any beneficiary.

My Personal Representative shall make such elections under the tax laws as my Personal Representative deems advisable, without regard to the relative interests of the beneficiaries. No adjustment shall be made between

principal and income or in the relative interests of the beneficiaries to compensate for the effect of elections under the tax laws made by my Personal Representative or by the trustee.

ARTICLE II
WRITTEN STATEMENT

I devise certain items of my Personal Property in accordance with a Written Statement which I shall have prepared prior to my death in conformity with Florida law. My Personal Representative may assume that no written statement exists if none is found within thirty (30) days after admission of this Will to probate.

ARTICLE III
PERSONAL PROPERTY

I give and bequeath all my jewelry, automobiles, clothing and other personal effects, as well as household goods, to my Wife, BLANCHE E. BOYLE.

In the event my Wife predeceases me, I give and bequeath the aforesaid items to my then living children in equal shares, to be distributed among them as they shall mutually agree, or in the absence of such agreement as my Personal Representative in its discretion shall deem advisable, making such distribution in as nearly equal shares as possible.

ARTICLE IV
MARITAL DEDUCTION

If my Wife survives me, I devise to my Wife the smallest pecuniary amount which, if allowed as a Federal estate tax marital deduction, would result in the least possible Federal estate tax being payable by reasons of my death. In determining the pecuniary amount my Personal Representative shall consider the credit for state death taxes only to the extent those taxes are not thereby incurred or increased, and shall assume that all payments and devises

under the preceding articles of this Will have been made or satisfied in full. My Wife shall be deemed to have survived me if she and I die under such circumstances that there is no sufficient evidence that we died otherwise than simultaneously.

My Personal Representative shall select and distribute to my Wife the cash, securities and other property, including real estate and interests therein, which shall constitute this bequest, employing for the purpose values current at the time or times of distribution. No asset or proceeds of any asset shall be selected as to which a marital deduction is not allowable.

ARTICLE V
RESIDUARY TRUST

The residue of my estate, I give and devise to my Trustee herein named, to be held as the Residuary Trust, in accordance with the following provisions:

1. If my Wife, BLANCHE E. BOYLE, survives me, then during her lifetime all the net income from the Residuary Trust shall be paid to or applied for her benefit in convenient installments but not less frequently than quarterly.

2. In addition, my Trustee, in its sole discretion, is also authorized to pay to or apply for the benefit of my Wife such sums from the principal of the Residuary Trust as it deems necessary or advisable from time to time for her medical care and support in reasonable comfort, taking into consideration all other income available to her for such purposes from all sources known to my Trustee.

3. Upon the death of my Wife during the period of this Trust for her benefit, or upon my death in the event my Wife fails to survive me, the principal of the Residuary Trust as it is then constituted, together with undistributed or

accumulated income shall be distributed to my son, JOHN J. BOYLE, or to his descendants, per stirpes.

4. I am making no provision for my stepson, BRUCE MICHAEL BOYLE, my daughter, LOUISE A. SCHMITT, my grandson, JOSEPH ROGER SCHMITT, my granddaughter, CATHERINE SCHMITT and my grandson, JAMES YOT BOYLE.

However, if my son, JOHN J. BOYLE, in his discretion determines that any of the above beneficiaries are in need of funds for their helath, maintenance, education and support, then JOHN J. BOYLE, may pay to them or for their benefit, so much of the income and principal of his inheritance as he determines to be required for the above stated purposes.

ARTICLE VI
ADMINISTRATIVE PROVISIONS

1. While in the hands of my Trustee, neither the principal nor the income of the Residuary Trust shall be liable for the debts of any beneficiary hereunder, nor shall the same be subject to seizure or attachment of any creditor of any beneficiary under any writ or proceeding at law or equity, and no beneficiary hereunder shall have any power to sell, assign, encumber, or in any manner to anticipate or dispose of his or her interest in the Residuary Trust, or in the income produced thereby.

2. If any beneficiary who is entitled to receive a share of the principal of the Residuary Trust shall be a minor, my Trustee is hereby authorized and empowered to continue to hold and manage such share for the benefit of such minor during his or her minority, and my Trustee may accumulate all or any part of the income from such minor's share or pay so much thereof, together with such amounts of the principal of his or her share of the Residuary Trust as it shall deem proper for his or her health, maintenance, support and complete education, adding any income not so used to principal at the end of each calendar year.

3. Notwithstanding any of the foregoing provisions to the contrary, if at any time my Trustee, in its sole and absolute discretion, shall determine that the Trust Estate or any share thereof, held under this Agreement, is, for any reason, uneconomical or impractical to administer, or does not amount to at least $50,000, in value at any time, my said Trustee shall have the right to pay out to the beneficiary then entitled to the income therefrom, the then remaining principal and accumulated income of such Trust Estate or share thereof. Any interest of any other persons in such Trust Estate or share shall thereupon cease. If any beneficiary, entitled to payment by reason of this clause, be a minor, such payment may be made to the guardian, parent or persons having custody of such minor, or to a custodian under the Florida Gifts to Minors Act, and the receipt of such person shall be a full acquittance of my Trustee.

4. In case the income or any discretionary payments of principal become payable to a minor or to a person under legal disability or to a person not adjudicated incompetent, but who, by reason of illness or mental or physical disability is, in the opinion of my Trustee, unable properly to administer such amounts, then such amounts shall be paid out by my Trustee in such of the following ways as it deems best: (1) directly to such beneficiary; (2) to the legally appointed guardian or conservator of such beneficiary; (3) to some relative or friend for the care, support and education of such beneficiary; (4) by my Trustee, using such amounts directly for such beneficiary's medical care, education and support in reasonable comfort.

ARTICLE VII
POWERS OF FIDUCIARIES

Any Fiduciary named in this Will shall have all of the powers and protection granted to them by statute at the time of acting hereunder including but not limited to the prudent man rule, Revised Florida Principal and Income Law, Florida Trust Administration Act, and the Florida

Probate Code, (all as may be amended from time to time) and not in limitation of any common-law or statutory authority, and without application to any court, they shall have the powers and responsibilities described below, to be exercised in their absolute discretion:

A. To sell any and all real estate held as an asset of my Estate and Trusts at such times, at public or private sale, for such prices and upon such terms as it deems advisable, and to make, execute and deliver any deed or deeds therefor, conveying title hereto in fee simple absolute, or for any less estate to any purchaser or purchasers, freed and discharged of any and all Trusts hereunder.

B. To sell, exchange, encumber, option or otherwise dispose of all or any portion of my Estate and Trusts in such manner and upon such terms and conditions as it deeds advisable, and to make, execute and deliver deeds, mortgages, leases, assignments and other documents necessary to effectuate any of the powers granted (which shall specifically include the authority to grant leases which extend beyond the term of any Trust hereunder and beyond the period authorized by law).

C. In the general administration of my estate hereunder, my fiduciaries are authorized to exercise all tax-related elections, options and choices in such manner as will achieve, in such fiduciaries' sole judgment, the overall minimum in total combined present and reasonably anticipated future taxes of all kinds, upon not only such Estate, but also its beneficiaries, any trusts hereunder and their beneficiaries. Without limitation on the foregoing authorization to minimize taxes shall include the following particular matters:

(a) Exclusion from or inclusion in my gross estate of any assets, and all matters of valuation, in the first instance, for Federal Estate Tax purposes;

(b) Election as to alternative valuation dates for Federal Tax purposes;

(c) Allocation of such charges and costs of administration as are available for reduction of either Federal Estate or Income Taxes;

(d) Election to file or not file any permitted joint return with my spouse and/or consent or not consent to having any gifts made by my spouse treated as having been made one-half by me for Gift Tax purposes;

(e) Election to continue, revoke or make any consent to any election under Subchapter S of the Internal Revenue Code;

(f) Selection of any appropriate Income Tax year, timing of distributions and of payment of deductible expenses, etc.; and

(g) Make distribution of assets in kind in such manner and irrespective of tax cost basis to or among beneficiaries as my fiduciaries shall decide in their sole and absolute discretion.

Such fiduciaries shall not be accountable to any person interested in any trust or in my Estate for the manner in which they shall carry out this authorization to minimize overall taxes, even though their decisions in this regard may result in increased tax or decreased distribution to a trust, to the estate, or to one or more beneficiaries, and there shall in no event be any compensating readjustments or reimbursements between any of the Trusts hereunder or any of the Trust or Estate accounts or beneficiaries by reason of the manner in which the fiduciaries thus carry out said authorization.

ARTICLE VIII

I nominate and appoint my wife, BLANCHE E. BOYLE and my son, JOHN J. BOYLE, as Co-Personal

Representatives and Co-Trustees of this my Last Will and Testament.

No bond, surety or other security shall be required in this or any other jurisdiction to the contrary notwithstanding.

IN WITNESS WHEREOF, I hereunto sign my name, and publish and declare this to be my Last Will and Testament in the presence of the persons witnessing it at my request this 2nd day of June, 1982.

/s/ James J. Boyle (SEAL)
JAMES J. BOYLE

WE HEREBY CERTIFY that the foregoing instrument was on the day and date hereof signed, sealed, published and declared by the Testator, JAMES J. BOYLE, as and for his Last Will and Testament, in our presence, who, at his request, in his presence and in the presence of each other, have subscribed our names hereto as witnesses of the execution thereof, believing said Testator, at the time of so signing, to be of sound mind and memory.

/s/ [ILLEGIBLE] residing at 600 NE 36th St #1916
MIAMI FLA 33137

/s/ [ILLEGIBLE] residing at 600 NE 36 ST
MIAMI FLA 33137

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

WE, JAMES J. BOYLE JEFFREY A. KERN and CRAIG DONOFF, the Testator and the Witnesses respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned officer that the Testator signed the instrument as his Last Will and Testament and that he signed voluntarily, in the presence of the witnesses, and that each of the witnesses, in the presence of the Testator, at his request, and in the presence of each other, signed the Will as a witness and that to the best of the knowledge of each witness, the Testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

/s/ James J. Boyle
TESTATOR

/s/ Jeffrey A. Kern
Witness

/s/ Craig Donoff
Witness

SUBSCRIBED AND ACKNOWLEDGED before me by JAMES J. BOYLE, the Testator, and subscribed and sworn to before me by JEFFREY A. KERN and CRAIG DONOFF the witnesses, on this 2 day of JUNE, 1982.

/s/ [ILLEGIBLE]
NOTARY PUBLIC State of Florida at Large.

My commission expires:
NOTARY PUBLIC STATE OF FLORIDA
BONDED THRU GENERAL INSURANCE UND
MY COMMISSION EXPIRES APR. 9 1986

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

[Filed 2/19 A.D. 1992]

Case No. 88-13866

LAST WILL AND TESTAMENT

OF

BLANCHE E. BOYLE

I, BLANCHE E. BOYLE, domiciled in Dade County Florida, hereby revoke all other Wills and Codicils which I have heretofore made.

ARTICLE I
TAXES AND EXPENSES

My Personal Representative shall pay all expenses of my last illness and funeral, costs of administration including ancillary, costs of safeguarding and delivering devises, and other proper charges against my estate. My Personal Representative shall pay from the residue of my estate all estate and inheritance taxes assessed by reason of my death, except that the amount, if any, by which the estate and inheritance taxes shall be increased as a result of the inclusion of property in which I may have a qualifying income interest for life or over which I may have a power of appointment shall be paid by the person holding or receiving that property. Interest and penalties concerning any tax shall be paid and charged in the same manner as the tax. I waive all rights of reimbursement for any payments made pursuant to this Article.

My Personal Representative's selection of assets to be sold to make the foregoing payments or to satisfy any pecuniary devises, and the tax effects thereof, shall not be subject to question by any beneficiary.

My Personal Representative shall make such elections under the tax laws as my Personal Representative deems advisable, without regard to the relative interests of the beneficiaries. No adjustment shall be made between

principal and income or in the relative interests of the beneficiaries to compensate for the effect of elections under the tax laws made by my Personal Representative or by the trustee.

ARTICLE II
WRITTEN STATEMENT

I devise certain items of my Personal Property in accordance with a Written Statement which I shall have prepared prior to my death in conformity with Florida law. My Personal Representative may assume that no written statement exists if none is found within thirty (30) days after admission of this Will to probate.

ARTICLE III
PERSONAL PROPERTY

I give and bequeath all my jewelry, automobiles, clothing and other personal effects, as well as household goods, to my Husband, JAMES J. BOYLE.

In the event my Husband predeceases me, I give and bequeath the aforesaid items to my then living children in equal shares, to be distributed among them as they shall mutually agree, or in the absence of such agreement as my Personal Representative in its discretion shall deem advisable, making such distribution in as nearly equal shares as possible.

ARTICLE IV
MARITAL DEDUCTION

If my Husband survives me, I devise to my Husband the smallest pecuniary amount which, if allowed as a Federal estate tax marital deduction, would result in the least possible Federal estate tax being payable by reasons of my death. In determining the pecuniary amount my Personal Representative shall consider the credit for state death taxes only to the extent those taxes are not thereby incurred or increased, and shall assume that all payments and devises

under the preceding articles of this Will have been made or satisfied in full. My Husband shall be deemed to have survived me if he and I die under such circumstances that there is no sufficient evidence that we died otherwise than simultaneously.

My Personal Representative shall select and distribute to my Husband the cash, securities and other property, including real estate and interests therein, which shall constitute this bequest, employing for the purpose values current at the time or times of distribution. No asset or proceeds of any asset shall be selected as to which a marital deduction is not allowable.

ARTICLE V
RESIDUARY TRUST

The residue of my estate, I give and devise to my Trustee herein named, to be held as the Residuary Trust, in accordance with the following provisions:

1. If my Husband, JAMES J. BOYLE, survives me, then during his lifetime all the net income from the Residuary Trust shall be paid to or applied for his benefit in convenient installments but not less frequently than quarterly.

2. In addition, my Trustee, in its sole discretion, is also authorized to pay to or apply for the benefit of my Husband such sums from the principal of the Residuary Trust as it deems necessary or advisable from time to time for his medical care and support in reasonable comfort, taking into consideration all other income available to him for such purposes from all sources known to my Trustee.

3. Upon the death of my Husband during the period of this Trust for his benefit, or upon my death in the event my Husband fails to survive me, the principal of the Residuary Trust as it is then constituted, together with undistributed or accumulated income shall be distributed to my son, JOHN J. BOYLE, or to his descendants, per stirpes.

4. I am making no provision for my son, BRUCE MICHAEL BOYLE, my daughter, LOUISE A. SCHMITT, my grandson, JOSEPH ROGER SCHMITT, my granddaughter, CATHERINE SCHMITT, and my grandson, JAMES YOT BOYLE.

However, if my son, JOHN J. BOYLE, in his discretion determines that any of the above beneficiaries are in need of funds for their helath, maintenance, education and support, then JOHN J. BOYLE, may pay to them or for their benefit, so much of the income and principal of his inheritance as he determines to be required for the above stated purposes.

ARTICLE VI
ADMINISTRATIVE PROVISIONS

1. While in the hands of my Trustee, neither the principal nor the income of the Residuary Trust shall be liable for the debts of any beneficiary hereunder, nor shall the same be subject to seizure or attachment of any creditor of any beneficiary under any writ or proceeding at law or equity, and no beneficiary hereunder shall have any power to sell, assign, encumber, or in any manner to anticipate or dispose of his or her interest in the Residuary Trust, or in the income produced thereby.

2. If any beneficiary who is entitled to receive a share of the principal of the Residuary Trust shall be a minor, my Trustee is hereby authorized and empowered to continue to hold and manage such share for the benefit of such minor during his or her minority, and my Trustee may accumulate all or any part of the income from such minor's share or pay so much thereof, together with such amounts of the principal of his or her share of the Residuary Trust as it shall deem proper for his or her health, maintenance, support and complete education, adding any income not so used to principal at the end of each calendar year.

3. Notwithstanding any of the foregoing provisions to the contrary, if at any time my Trustee, in its sole and

absolute discretion, shall determine that the Trust Estate or any share thereof, held under this Agreement, is, for any reason, uneconomical or impractical to administer, or does not amount to at least $50,000, in value at any time, my said Trustee shall have the right to pay out to the beneficiary then entitled to the income therefrom, the then remaining principal and accumulated income of such Trust Estate or share thereof. Any interest of any other persons in such Trust Estate or share shall thereupon cease. If any beneficiary, entitled to payment by reason of this clause, be a minor, such payment may be made to the guardian, parent or persons having custody of such minor, or to a custodian under the Florida Gifts to Minors Act, and the receipt of such person shall be a full acquittance of my Trustee.

4. In case the income or any discretionary payments of principal become payable to a minor or to a person under legal disability or to a person not adjudicated incompetent, but who, by reason of illness or mental or physical disability is, in the opinion of my Trustee, unable properly to administer such amounts, then such amounts shall be paid out by my Trustee in such of the following ways as it deems best: (1) directly to such beneficiary; (2) to the legally appointed guardian or conservator of such beneficiary; (3) to some relative or friend for the care, support and education of such beneficiary; (4) by my Trustee, using such amounts directly for such beneficiary's medical care, education and support in reasonable comfort.

ARTICLE VII
POWERS OF FIDUCIARIES

Any Fiduciary named in this Will shall have all of the powers and protection granted to them by statute at the time of acting hereunder including but not limited to the prudent man rule, Revised Florida Principal and Income Law, Florida Trust Administration Act, and the Florida Probate Code, (all as may be amended from time to time) and not in limitation of any common-law or statutory

authority, and without application to any court, they shall have the powers and responsibilities described below, to be exercised in their absolute discretion:

A. To sell any and all real estate held as an asset of my Estate and Trusts at such times, at public or private sale, for such prices and upon such terms as it deems advisable, and to make, execute and deliver any deed or deeds therefor, conveying title hereto in fee simple absolute, or for any less estate to any purchaser or purchasers, freed and discharged of any and all Trusts hereunder.

B. To sell, exchange, encumber, option or otherwise dispose of all or any portion of my Estate and Trusts in such manner and upon such terms and conditions as it deeds advisable, and to make, execute and deliver deeds, mortgages, leases, assignments and other documents necessary to effectuate any of the powers granted (which shall specifically include the authority to grant leases which extend beyond the term of any Trust hereunder and beyond the period authorized by law).

C. In the general administration of my estate hereunder, my fiduciaries are authorized to exercise all tax-related elections, options and choices in such manner as will achieve, in such fiduciaries' sole judgment, the overall minimum in total combined present and reasonably anticipated future taxes of all kinds, upon not only such Estate, but also its beneficiaries, any trusts hereunder and their beneficiaries. Without limitation on the foregoing authorization to minimize taxes shall include the following particular matters:

(a) Exclusion from or inclusion in my gross estate of any assets, and all matters of valuation, in the first instance, for Federal Estate Tax purposes;

(b) Election as to alternative valuation dates for Federal Tax purposes;

(c) Allocation of such charges and costs of administration as are available for reduction of either Federal Estate or Income Taxes;

(d) Election to file or not file any permitted joint return with my spouse and/or consent or not consent to having any gifts made by my spouse treated as having been made one-half by me for Gift Tax purposes;

(e) Election to continue, revoke or make any consent to any election under Subchapter S of the Internal Revenue Code;

(f) Selection of any appropriate Income Tax year, timing of distributions and of payment of deductible expenses, etc.; and

(g) Make distribution of assets in kind in such manner and irrespective of tax cost basis to or among beneficiaries as my fiduciaries shall decide in their sole and absolute discretion.

Such fiduciaries shall not be accountable to any person interested in any trust or in my Estate for the manner in which they shall carry out this authorization to minimize overall taxes, even though their decisions in this regard may result in increased tax or decreased distribution to a trust, to the estate, or to one or more beneficiaries, and there shall in no event be any compensating readjustments or reimbursements between any of the Trusts hereunder or any of the Trust or Estate accounts or beneficiaries by reason of the manner in which the fiduciaries thus carry out said authorization.

ARTICLE VIII

I nominate and appoint my husband, JAMES J. BOYLE and my son, JOHN J. BOYLE, as Co-Personal Representatives and Co-Trustees of this my Last Will and Testament.

No bond, surety or other security shall be required in this or any other jurisdiction to the contrary notwithstanding.

IN WITNESS WHEREOF, I hereunto sign my name, and publish and declare this to be my Last Will and Testament in the presence of the persons witnessing it at my request this 2nd day of June, 1982.

/s/ Blanche E. Boyle (SEAL)
BLANCHE E. BOYLE

WE HEREBY CERTIFY that the foregoing instrument was on the day and date hereof signed, sealed, published and declared by the Testatrix, BLANCHE E. BOYLE, as and for her Last Will and Testament, in our presence, who, at her request, in her presence and in the presence of each other, have subscribed our names hereto as witnesses of the execution thereof, believing said Testatrix, at the time of so signing, to be of sound mind and memory.

/s/ [ILLEGIBLE] residing at 600 NE 36 ST
MIA FLA 33137

/s/ [ILLEGIBLE] residing at 600 NE 36th st #1916
MIAMI FLA 33137

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

WE, BLANCHE E. BOYLE CRAIG DONOFF and JEFFREY A. KERN, the Testatrix and the Witnesses respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned officer that the Testatrix signed the instrument as her Last Will and Testament and that she signed voluntarily, in the presence of the witnesses, and that each of the witnesses, in the presence of the Testatrix, at her request, and in the presence of each other, signed the Will as a witness and that to the best of the knowledge of each

witness, the Testatrix was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

/s/ Blanche E. Boyle
TESTATRIX

/s/ Craig Donoff
Witness

/s/ Jeffrey A. Kern
Witness

SUBSCRIBED AND ACKNOWLEDGED before me by BLANCHE E. BOYLE, the Testatrix, and subscribed and sworn to before me by CRAIG DONOFF and JEFFREY A. KERN, the witnesses, on this 2 day of JUNE, 1982.

/s/ [ILLEGIBLE]
NOTARY PUBLIC State of Florida at Large.

My commission expires:
NOTARY PUBLIC STATE OF FLORIDA
BONDED THRU GENERAL INSURANCE UND
MY COMMISSION EXPIRES APR. 9 1986

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

[Filed 2/19 A.D. 1992]

Case No. 88-13866

LAST WILL AND TESTAMENT

I, JAMES J. BOYLE, of 5875 S.W. 35th Street, Miami, County of Dade and State of Florida, being of sound mind and memory and realizing the uncertainties of this life, do hereby make, publish and declare this to be my last Will and Testament, hereby expressly revoking any and all wills by me at any time heretofore made.

FIRST: I direct that all my just debts and funeral expenses be promptly paid out of the principal of my estate.

SECOND: I hereby constitute and appoint my son, JOHN J. BOYLE, of 5895 S.W. 35th Street, Miami, Florida, to be the Personal Representative of this my last Will and Testament. It is my desire that my son, JOHN J. BOYLE, shall not be required to give bond in any amount for the faithful performance of his duties hereunder as Personal Representative.

THIRD: I give and bequeath and devise all of my property, real and or personal, and wheresoever situate, to my son, JOHN J. BOYLE, per stirpes, for his own use and benefit absolutely and forever.

FOURTH: I authorize and empower my Personal Representative to sell, mortgage and or lease all or any of the real and or personal property of which I may die seized or possessed, at public or private sale, and without court order, at such times and on such terms and conditions as he shall deem best and proper, and to execute, acknowledge and deliver all proper writings, bills of sale, deeds of conveyance and transfers therefor.

IN WITNESS WHEREOF, I have hereunto set my hand and seal at Coral Gables, County of Dade and State of Florida, this the 7th day of October, 1987.

/s/ James J. Boyle (SEAL)
JAMES J. BOYLE

The above and foregoing typewritten instrument was subscribed by the Testator, JAMES J. BOYLE, in our presence and acknowledged by him to each of us to be his last Will and Testament, and we at his several request, have signed our names as witnesses hereto in his presence and in the presence of each other and written opposite our names our respective places of residence.

Coral Gables, Florida, this the 7th day of October, 1987.

NAME	RESIDENCE
[ILLEGIBLE]	2600 SEGOVIA ST. CORAL GABLES, FL. 33134
[ILLEGIBLE]	6830 S.W. 59th Street Miami, Florida 33143

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

[Filed 2/19 A.D. 1992]

Case No. 88-13866

LAST WILL AND TESTAMENT

OF

BLANCHE E. BOYLE

I, BLANCHE E. BOYLE, of Dade County, Florida, by this instrument revoke my former Wills and Codicils to them and declare this to be my Will.

ARTICLE I
BENEFICIARIES

The following persons are named beneficiaries of this Will:

My Husband, JAMES J. BOYLE,

My Daughter, LOUIS ANN SCHMIDT

My Son, JOHN J. BOYLE

My Son, BRUCE M. BOYLE

My Grandchildren, JAMES BOYLE;
NISA BOYLE;
KATHERINE BOYLE

ARTICLE II
SPECIFIC DEVISE-LIFE ESTATE

If my Husband, JAMES J. BOYLE, shall survive me, I devise to him all real property which I may own at the time of my death, to have and to hold during the term of his life, then to my son, JOHN J. BOYLE, in fee simple absolute. I direct that my said Husband during his life tenure shall pay all charges incident to maintaining said property including, without limitation, all assessments, insurance premiums, taxes, and ordinary repairs.

I direct that my said Husband shall not be required to furnish or file in any court an inventory of the property herein devised to him for life, nor to give a bond or other security for the safekeeping thereof.

ARTICLE III
SPECIFIC DEVISE

To my Daughter, LOUISE ANN SCHMIDT, I devise the sum of $100.00.

ARTICLE IV
RESIDUAL BENEFICIARIES

All the rest, residue and remainder of the property which I may own at the time of my death, real, personal and mixed, tangible and intangible, of whatsoever nature and wheresoever situated, including all property which I may acquire or become entitled to after the execution of this Will, including all lapsed legacies and devises or other gifts made by this Will fail for any reason, including any property over or concerning which I may have any power of appointment, I devise 10% to my son BRUCE M. BOYLE, and the remaining balance of my residuary estate to my grandchildren, JAMES BOYLE, NISA BOYLE and KATHERINE BOYLE, born to my son JOHN J. BOYLE, to share and share alike per capita.

If, subsequent to the execution of this Will, there shall be an additional child or children born to my son, JOHN J. BOYLE, and if any such child or children shall survive me, such child or children shall share in the benefits of my estate equally and to the same extent (and to no greater extent) and in the same manner as my grandchildren heretofore named; and the provisions of this Will shall be deemed modified to the extent necessary to effectuate this intention.

ARTICLE V
PAYMENT OF CLAIMS, EXPENSES AND ESTATE TAXES

I direct my Personal Representative to pay from my probate estate all of the expenses of my last illness, funeral expenses, costs of administration and other proper charges against my estate. I also direct my Personal Representative to pay from my probate estate all costs of ancillary administration, and all estate and inheritance taxes that are payable because of my death, even though property that is included in the determination of a tax does not pass under this Will. Insofar as possible that payment shall be made as an expense of administration without apportionment to anyone and without seeking contribution from anyone, provided, however, that any estate tax attributable to property of a trust included in my gross estate for the federal estate tax shall be paid from the property of that trust. The tax attributable to the trust shall be the amount by which the tax paid exceeds that amount of tax that would have been payable if the trust had not been included in the gross estate. No payment shall be made of a generation skipping transfer tax.

ARTICLE VI
TRUST FOR CHILDREN AND INCOMPETENTS

Provided, however, notwithstanding any other provisions in this Will, except for gifts of tangible personal property, no gifts of income or principal that otherwise would be distributed from my estate or from this or any other trust or under a power of appointment created or exercised by this Will shall vest, except as provided in this item in

(a) any person who has not attained his 18th birthday at the time for distribution, or in

(b) any person who, in the judgment of the fiduciary making the distribution, shall be unable to manage his own

property or affairs because of illness, disability, incompetency or other reason, whether or not the incompetency is adjudicated, that person being referred to hereafter as being under disability.

Instead, the gift that otherwise would be distributed to that person shall be distributed to the Trustees of the TRUST FOR CHILDREN AND INCOMPETENTS hereafter appointed, in trust, for that person and managed and distributed as follows:

A. The Trustees shall hold the gift for each person as an undivided share for his benefit in the TRUST FOR CHILDREN AND INCOMPETENTS, which share shall be the proportion that the value of the gift bears to the value of the entire principal of the trust at the time of the gift, including the value of the gift. Shares of beneficiaries shall be adjusted from time to time for contributions to principal and for invasions and distributions of principal and additions to principal of undistributed income. If a share exists in this trust for a beneficiary for whom a distribution is to be made to this trust, the distribution shall be added to the existing share in this trust for the beneficiary in order that there will be only one share under this item for the same beneficiary.

B. If in the judgment of the Trustees a beneficiary who has been under disability becomes able to manage his own property and affairs and the beneficiary has attained his 18th birthday, his share of the trust assets shall be distributed to him in the manner hereafter provided; but if he has not attained that birthday, his share in the trust shall continue and be administered as for a beneficiary not under disability.

C. Income of the trust shall be distributed in the following manner:

(1) Until a beneficiary attains his 21st birthday, and as long as a beneficiary is under disability, his share of the

net income of the trust shall be distributed to or for his direct or indirect benefit in the discretion of the Trustees, the distribution to be determined and made in the same manner and for the purposes for which discretionary distributions of principal are authorized. All undistributed income shall be added to the principal of the beneficiary's share in the trust.

(2) All of the net income from the share of a beneficiary not under disability shall be distributed to or for the benefit of the beneficiary if he has attained his 21st birthday. Distributions shall be made not less frequently than quarter annually, and at the request of a beneficiary or his guardian, they shall be made monthly.

D. Discretionary distributions of the principal of a share in the trust may be made from time to time or for the direct or indirect benefit of the beneficiary of the share even though it results in exhausting the principal of the share. The distributions shall be in such amounts as in the discretion of the Trustee shall be necessary or desirable for reasonable support and maintenance of the beneficiary in good health, and for his welfare and education, taking into consideration the standard of living to which the beneficiary or his family is accustomed at the time of the distribution. This discretion shall be exercised after taking into consideration all other income and cash resources known to the Trustees that are available to the beneficiary for such purposes, including the obligation of support by another without borrowing or making sales of property. In exercising this discretion, the Trustees shall be primarily concerned with the interest of the income beneficiary rather than the remaindermen.

E. When a beneficiary not under disability attains his 21st birthday his share in the trust shall be distributed to him, and the trust terminated as to him.

F. If a beneficiary shall die before termination of his share, in trust, upon his death his share in the trust estate shall be managed and the principal and income distributed in the manner appointed by his Will duly proved and by specific reference to this appointment, provided the appointment shall be to or for the benefit of one or more persons for his grandparents, their descendants, the spouses and former spouses of his grandparents and their descendants, or either of them, other than the beneficiary's estate, his creditors or the creditors of his estate. Any property not so appointed shall be distributed according to the order of interstate succession to those persons who would be the beneficiary's heirs if he had died interstate as a Florida resident.

G. If in the judgment of the Trustees the value of the principal held in this trust does not warrant the continuance of the trust under the circumstances then existing, the Trustees in their discretion are authorized to terminate the trust and to distribute to each beneficiary his share of the assets of the trust. A distribution to a beneficiary who is a minor at the time of distribution shall be made to the custodian for the minor under the Florida Gift to Minors Act. If there is none, the custodians shall be appointed by the Trustees, and the Trustees may appoint one of themselves as custodian.

H. Provided, however, if all of a share in the trust created under this Will has not vested 21 years after the death of the survivor of the beneficiaries and contingent beneficiaries of the trust who are living at the time of my death, then at that time the remainder of the trust shall vest in the beneficiaries to whom income may be distributed, that vesting to be in the proportions in which the beneficiaries are eligible to receive distribution of income if made. In the case of the undetermined shares, the vesting shall be in per stirpital shares. Each share shall be held by the Trustees in trust for the beneficiary as part of the TRUST FOR

CHILDREN AND INCOMPETENTS, elsewhere described and administered and distributed in the manner provided for that trust, except that if the beneficiary shall die before receiving distribution of his share in the trust, this share shall be distributed to the Personal Representative of the beneficiary's estate.

I. Except for the right to disclaim, and except as specifically provided by powers of appointment, no principal or income distributable from this trust shall be subject to anticipation, assignment, mortgage or pledge in any manner by any beneficiary, and shall not be reached by any legal or equitable or other proceedings, including bankruptcy proceedings, in satisfaction of any debts or liability of a beneficiary prior to receipt by the beneficiary.

ARTICLE VII
APPOINTMENT OF PERSONAL REPRESENTATIVE AND TRUSTEE

(A) I hereby nominate, constitute and appoint my Daughter-in-law, NISA BOYLE, of 5895 S.W. 35 Street, Miami, Florida 33155, as my Personal Representative of my estate. Should she predecease me, or fail to qualify, or having qualified should die, resign or become incapacitated during the period of administration of my estate, then I appoint my son, JOHN J. BOYLE, of 5895 S.W. 35 Street, Miami, Florida 33155, as successor Personal Representative. I direct that no bond be required of any individual Personal Representative.

(B) I appoint my Daughter-in-law, NISA BOYLE, of 5895 S.W. 35 Street, Miami, Florida 33155, Trustee of the trust described in this Will. Should she predecease me, or fail to predecease me, resign, become incapacitated or otherwise fail to serve as Trustee of the trust, then I appoint my son, JOHN J. BOYLE, of 5895 S.W. 35 Street, Miami, Florida 33155 to serve as Trustee of that trust. I direct that no bond be required on any individual Trustee.

(C) I have appointed the Personal Representatives named in this Will in reliance upon my faith in their ability and integrity. For this reason, a Trustee named in this Will that does not serve as Personal Representative of my estate is relieved of all duties that he otherwise might have to examine into and satisfy itself as to the accounts of the Personal Representative in the administration of my estate. The Trustee is authorized to accept assets that are distributed to the Trustee by the Personal Representative of my estate as being in full satisfaction of all gifts to the Trustee under this Will. For the same reason, any Trustee that succeeds a Trustee named in this Will is relieved of all duties that it otherwise might have to examine into and satisfy himself as to the accounts of the predecessor Trustee. The successor Trustee is authorized to accept the assets delivered to him by the predecessor Trustee as constituting the entire trust estate.

(D) I waive compliance with any law requiring qualification of Trustees or registration of trusts, or administration or accounting by Trustees under the supervision of any court. Instead, the Trustees shall furnish not less frequently than annually an accounting to each trust beneficiary who is entitled to receive current distributions of income whether or not distributed, and whether or not the distribution is discretionary. The accounting shall be only for the trust in which the person receiving the accounting is interested. Any person legally entitled to act for him shall state in writing his objections to an accounting and deliver the objections to the Trustees within six months after receipt of a copy of the accounting. Failure to object in this manner shall constitute a waiver of objections. The waiver shall be binding as to all matters stated in the accounting, or as shown by it, upon all persons claiming under the waiving beneficiary, whether or not in being, who are then or thereafter may become eligible to share in either the principal or the income of the trust for which the accounting is made.

(E) Each Trustee hereunder, whether originally designated herein or appointed as successor, shall have the right to resign at any time by giving thirty days written notice to that effect to the current income beneficiary or a majority of such, shall have the right within such thirty day period to appoint a successor Trustee and shall notify the Trustee of such appointment. In the event the current income beneficiary or beneficiaries shall fail to designate a successor Trustee within the time specified, the then acting Trustee may apply to a court of competent jurisdiction for leave to resign, for the appointment of a successor and the judicial settlement of its account.

(F) Any successor Trustee hereunder shall possess and exercise all powers and authority herein conferred on the original Trustee.

(G) No purchaser or other person dealing with any Trustee or Trustees purporting to act under any power or authority granted in, or given by any Trustee in purported compliance with this item, or any part or parts of it, need be concerned to inquire into the existence of facts upon which the purported power or authority depends, or into the question whether the purported power or authority still exists.

(H) The Personal Representatives and Trustees shall not be liable for damage or loss caused by honest errors of judgment made by them or their agents or employees, or by any good faith exercise of the discretions given them.

ARTICLE VIII
POWERS OF PERSONAL REPRESENTATIVE AND TRUSTEE

I hereby grant to my Personal Representative and also to the Trustee of each trust established hereunder, including any substitute or successor Personal Representative or Trustee, the continuing, absolute, discretionary power to deal with any property, real or personal, held in my estate or

in any trust, as freely as I might in the handling of my own affairs. Such power may be exercised independently and without the prior or subsequent approval of any court or judicial authority, and no person dealing with the Personal Representative or Trustee shall be required to inquire into the propriety of any of their actions. Without in any way limiting the generality of the foregoing, I hereby grant to my Personal Representative and also to any Trustee hereunder, the following specific powers of authority in addition to, and not in substitution of, powers conferred by law:

(A) To compromise, settle or adjust any claim or demand by or against my estate or any trust and to agree to any rescission or modification of any contract or agreement.

(B) To retain any security or other property owned by me at the time of my death, so long as such retention appears advisable, and to exchange any such security or property for other securities or properties and to retain such items received in exchange. My Personal Representative or Trustee may presume that I have confidence in the securities owned by me at the time of my death, and therefore no sale thereof shall be made solely in order to diversify investments. I also waive the provisions of F.S.A. sec. 738.12 relating to underproductive property with respect to any property owned by me at the time of my death.

(C) To sell, exchange, assign, transfer and convey any security or property, real or personal, held in my estate or in any trust fund, at public or private sale, at such time and price and upon such terms and conditions including credit as it may determine.

(D) To invest and reinvest in such stocks, bonds and other securities and properties as it may deem advisable, including stocks and unsecured obligations, undivided interests, interests in investment trusts, common trust funds, stock in a mutual trust investment company, mutual funds, leases, and property which is outside of my domicile,

all without diversification as to kind or amount, without being restricted in any way by any statute or court decision, now or hereafter existing, regulating or limiting investments by fiduciaries.

(E) To register and carry any property in its own name or in the name of its nominees or to hold it unregistered, but without hereby increasing or decreasing its liability as fiduciary.

(F) To sell or exercise any "rights" issued on any security held in my estate or in any trust fund hereunder.

(G) Unless inconsistent with other provisions of this instrument, to consider and treat as principal all dividends payable in stock, all dividends in liquidation, and all "rights" issued on securities and to consider and treat as income all other dividends received except those declared and payable as of a "record date" preceding my death, which shall be considered and treated as principal.

(H) To charge or credit to principal any premiums and discounts on securities purchased at more or less than par.

(I) To vote in person or by proxy any stocks or securities held, and to grant such proxies and powers of attorney to such person or persons as it may deem proper.

(J) To consent to and participate in any plan for the liquidation, reorganization, consolidation or merger or any corporation, any security of which is held.

(K) To borrow money from itself individually or from others upon such terms and conditions as it may determine and to mortgage and pledge estate and trust assets as security for the payment thereof.

(L) To lease any real estate for such term or terms and upon such conditions and rentals and in such manner as it may deem advisable with or without privilege of purchase, and any lease so made shall be valid and binding for the full

term thereof even though same shall extend beyond the duration of the trust. To make repairs, replacements and improvements, structural or otherwise, to any such real estate, to insure against fire or other risk and to charge the expense thereof to principal or income or apportion same between principal and income as it may deem proper. To subdivide real estate, to dictate some to public use and to grant easements as it may deem proper.

(M) Whenever required or permitted to divide and distribute my estate or any trust created thereunder, to make such division or distribution in money or in kind or partly in money and partly in kind; and to exercise all powers herein conferred, after the termination of any trust until the same is fully distributed.

(N) To employ accountants, attorneys and such agents as it may deem advisable; to pay reasonable compensation for their services and to charge same to or apportion same between income and principal as it may deem proper.

(O) Unless consistent with other provisions of this instrument, to hold two or more trusts or other funds in one or more consolidated funds, in which the separate trusts or funds shall have undivided interests.

(P) Wherever authorized by this instrument to accumulate or distribute income, to make such decision free from attack or question by any person, it being intended that the Trustee may feel free to make such decisions on the basis of the facts as they exist at the time any such decision is made.

(Q) With respect to any trust governed by this instrument, to distribute to any one or more of its beneficiaries from the principal thereof such sums as in the sole discretion of the Trustee shall be sufficient to insure such trust being treated under the federal income tax law as one having no "undistributed net income" for a given taxable year, as that term is defined in the federal Internal

Revenue Code, sec. 665, if the Trustee, in its sole discretion, shall deem such treatment desirable for any reason.

(R) Abandon, in any way, property which it determines not to be worth protecting.

(S) With regard to all policies of insurance on my life which designate any Trustee hereunder as beneficiary, the Trustee is specifically authorized and empowered:

(a) to execute and deliver receipts and other instruments and to take such action as may be appropriate to obtain possession and control of such policies.

(b) to execute and file proofs of claim required to collect the proceeds thereof and the receipt of my Trustee shall constitute full acquittance to insurance companies for all proceeds so paid; provided, however, that my Trustee shall be under no obligation to institute legal proceedings for the collection of proceeds of any policy until and unless it has been indemnified to its satisfaction for all costs and expenses, including attorneys' fees.

(c) to elect, in its discretion, any optional modes of settlement available to it under said policies.

(d) to receive insurance proceeds and to administer and distribute same as principal in accordance with the dispositive provisions of this Will; and in connection therewith to divide, apportion and distribute said proceeds between the trusts created hereunder, including the power to make tentative allocations between such trusts and subsequently adjust same.

(e) to use the proceeds of insurance policies in the purchase from my estate of such assets as the Trustee deems advisable without being limited to assets authorized by law for the investment of trust funds.

(T) No assets which are exempt from federal estate tax, if not payable to my Personal Representative, shall be used

by my Personal Representative for the payment of debts, funeral expenses, administrative expenses, taxes or other obligations of my estate.

(U) To satisfy any charitable pledge, devise or any other similar obligation with cash or assets, in kind, as the Personal Representative or Trustee in its discretion shall elect.

(V) To make any distribution or division required under this Will, including the satisfaction of any pecuniary devise in cash or in other property, real or personal, or undivided interests therein, or partly in cash and partly in such other property, and prorata or otherwise as to any particular asset, and to do so without regard to the income tax basis of specific property allocated to any beneficiary, including any trust.

ARTICLE IX
PRESUMPTION OF SURVIVORSHIP

If my Husband and I should die under circumstances that render it doubtful whether my Husband or I died first, it shall be presumed conclusively for the purpose of making distributions under this Will of property owned by us jointly with the right of survivorship or in an estate by the entirety and of proceeds of life insurance, that my Husband predeceased me.

ARTICLE X
DEFINITIONS

Wherever in this instrument the context and facts permit, masculine, feminine and neuter pronouns and the words "Personal Representative" and "Trustee", whether singular or plural, shall include the singular and plural and all genders and future fiduciaries as well as those named in this instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 28th day of October, 1985.

/s/ Blanche E. Boyle
BLANCHE E. BOYLE

THE FOREGOING INSTRUMENT, consisting of fifteen (15) pages, including this page, was signed, sealed, published and declared by BLANCHE E. BOYLE, the Testatrix, as and for her Last Will and Testament, in our presence, and being present at the same time and thereupon we, at her request, subscribed our names as witnesses this 28th day of October, 1985.

/s/ [ILLEGIBLE] residing at [ILLEGIBLE]

/s/ [ILLEGIBLE] residing at 3651 NW 16ST
MIAMI FL 33195

/s/ [ILLEGIBLE] residing at [ILLEGIBLE]

STATE OF FLORIDA)
SS.
COUNTY OF DADE)

We, BLANCHE E. BOYLE, David A. [ILLEGIBLE] [ILLEGIBLE] and KAREN E [ILLEGIBLE], the Testatrix and witnesses, respectively, whose names are signed to the attached instrument, being first duly sworn, do hereby declare to the undersigned officer that the Testatrix signed the instrument as her Last Will and Testament and that she signed it voluntarily and that each of the witnesses, in the presence of the Testatrix, at her request, and in the presence of each other signed the Will as a witness thereto, and that to the best of the knowledge of each witness, the Testatrix was at that time eighteen (18) or more years of age, of sound mind and under no constraint or undue influence.

/s/ Blanche E. Boyle
TESTATRIX

/s/ [ILLEGIBLE]
WITNESS

/s/ [KAREN E. ILLEGIBLE]
WITNESS

SUBSCRIBED and ACKNOWLEDGED before me by BLANCHE E. BOYLE, the Testatrix, and SUBSCRIBED AND SWORN to before me by [ILLEGIBLE], [ILLEGIBLE] and KAREN E. [ILLEGIBLE], the witnesses, on the 28th day of October, 1985.

/s/ [ILLEGIBLE]
NOTARY PUBLIC STATE OF FLORIDA AT LARGE

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES SEPT 30, 1989
BONDED THRU GENERAL INS. UND.

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

[Filed 2/19 A.D. 1992]

Case No. 88-13866

LAST WILL AND TESTAMENT

OF

BLANCHE E. BOYLE

I, BLANCHE E. BOYLE, a resident of Dade County, Florida, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any and all prior Wills and Codicils thereto, heretofore made by me.

FIRST

I give, devise and bequeath such of my tangible personal property to those persons who are designated in a separate writing in existence at the time of my death, which is signed by me and which describes the items and the devisees with reasonable certainty.

SECOND

Not being unmindful of my husband, James Boyle and my sons, John Boyle and Bruce Boyle, I hereby give, devise and bequeath all of the rest, residue and remainder of my estaste, whether real, personal or mixed, of whatever kind and description and wheresoever situate, to my daughter, LOUISE ANN SCHMITT, and nominate, constitute and appoint her as Personal Representative of this, my Last Will and Testament, to serve without bond.

THIRD

If my said daughter should predecease me I hereby give, devise and bequeath all of the rest, residue and remainder of my estate to my grandchildren, JOSEPH SCHMITT and CATHERINE SCHMITT share and share alike, and nominate, constitute and appoint my son-in-law, ROGER

SCHMITT as Personal Representative of this, my Last Will and Testament.

IN WITNESS WHEREOF, I have hereunto set my hand and seal at Coral Gables, Dade County, Florida this 15ty day of September 1987.

/s/ Blanche E. Boyle (SEAL)

WE, the undersigned attesting witnesses, do hereby certify and acknowledge that we have, this 15th day of September 1987, in the City of Coral Gables, Florida, seen the above named Testatrix affix her signature on the bottom of Pages 1 and at the end of the above and foregoing instrument, which was declared by her to be her Last Will and Testament, and we have, at her request, and in her presence and in the presence of each other, affixed our signatures hereto as witnesses thereof, we each believing that the said Testatrix is of sound and disposing mind, memory and understanding; this clause having first been read to us and we now intending to certify that the matters and things set forth took place in fact and in the order stated.

/s/ Denise M Kadar residing at 5930 SW 59 ST
MIAMI, FLORIDA 33143

/s/ Belkis Villar residing at 237 Madeira Ave.
Coral Gables, Fla. 33134

/s/ Robert M. Brake residing at 1300 Coral Way
Coral Gables, Florida

STATE OF FLORIDA
COUNTY OF DADE

BLANCHE E. BOYLE, and Robert M. Brake and Belkis Villar the Testatrix and witnesses respectively whose names are signed to the foregoing instrument, were sworn and declared to the undersigned officer that the Testatrix signed the instrument as his Last Will and Testament; and that she and each of the witnesses signed in the presence of each other and their capacities set forth herein.

/s/ Blanche E. Boyle
Testatrix

/s/ Robert M. Brake
Witness

/s/ Belkis Villar
Witness

Subscribed and sworn to before me this 15th day of September 1987

/s/ [ILLIGIBLE]
Notary Public, State of Florida at Large.

My Commission Expires:
Notary Public, State of Florida at Large
My Commission Expires Sept 22, 1990

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

[Filed 2/19 A.D. 1992]

[RECORDED JUN 5 1989]

Case No. 88-13866

Superior Court of the State of California
FOR THE COUNTY OF SAN DIEGO

RECEIPT FOR DEPOSITED WILL (PR. C. 320)

Last Will and Testament of BLANCHE E BOYLE

Number of Pages (Will) 1 (Codicils) 0

Deposited by L. FREDERICK WILLIAMS

Number 36083

Date Received 5/5/89

ROBERT D. ZUMWALT,
County Clerk

By /s/ [ILLEGIBLE]
Deputy

A TRUE COPY
CERTIFICATION ON LAST PAGE
MARSHALL ADER, CLERK

OFF. REC BK.
14130PG0315

STATE OF FLORIDA, COUNTY OF DADE

April 16, 92

(S E A L)

By /s/ [ILLEGIBLE]
Deputy Clerk

LAST WILL AND TESTAMENT

OF

BLANCHE E. BOYLE

I, BLANCHE E. BOYLE, a resident of San Diego, California, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any and all prior Wills and Codicils thereto, heretofore made by me.

FIRST

Not being unmindful of my sons, John Boyle, who is now suing me, and Bruce Boyle, I hereby give, devise and bequeath all of the rest, residue and remainder of my estate, whether real, personal or mixed, of whatever kind and description and wheresoever situate, to my daughter, LOUISE ANN SCHMITT, and nominate, constitute and appoint her as Personal Representative of this, my Last Will and Testament, to serve without bond.

SECOND

If my said daughter should predecease me or be unable to serve, I hereby give, devise and bequeath all of the rest, residue and remainder of my estate to my grandchildren, JOSEPH SCHMITT AND CATHERINE SCHMITT share and share-alike, and nominate, constitute and appoint my son-in-law, ROGER SCHMITT as Personal Representative of this, my Last Will and Testament.

IN WITNESS WHEREOF, I have hereunto set my hand and seal at Encinitas, San Diego County, California this 19th day of December, 1988.

/s/ Blanche E. Boyle (SEAL)

/s/ [ILLEGIBLE] (WITNESS)

/s/ [ILLEGIBLE] (WITNESS)

OFF. REC BK. 14130PG0316

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

PROBATE DIVISION 02

CASE NO. 89-2886

Florida Bar No: 008306

IN RE: THE ESTATE OF

BLANCHE E. BOYLE

Deceased

COPY OF CALIFORNIA RECEIPT
FOR WILL AND WILL

State of Florida
County of Dade
I hereby Certify this document a true copy of the Original Instrument

Witness my hand and Official Seal,

This _____ day of JAN -9 1992

Clerk Circuit Court

By /s/ Judith Humphries 3813
JUDITH HUMPHRIES
Deputy Clerk